Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 88-1236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE CITY OF WATSONVILLE,

Defendant-Petitioner,

—against—

DOLORES CRUZ GOMEZ; PATRICIA LEAL; and WALDO RODRIGUEZ,

Plaintiffs-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 25, 1989

QUESTIONS PRESENTED

1. Has the Ninth Circuit Court of Appeals utilized an improper standard for proof of political cohesiveness?

2. Has the Ninth Circuit Court of Appeals utilized an improper standard for proof of geographical compactness?

3. Has the Ninth Circuit Court of Appeals wrongfully rejected the totality of the circumstances as they exist in the City of Watsonville in finding a violation of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973?

PARTIES BELOW

The appellants in the court below were Dolores Cruz Gomez, Patricia Leal and Waldo Rodriguez.

The appellee below was The City of Watsonville.

When plaintiffs originally filed this action in the United States District Court for the Northern District of California on May 21, 1985, the named defendants also included Ann Soldo, Mayor of the City of Watsonville; Rex Clark, Vido Deretich, Joe Marsano, Ray Ingersoll, Betty Murphy and Gwen Carroll, as councilmembers of the City of Watsonville, in their official capacities as members of the City Council of the City of Watsonville; and Lorraine Washington, City Clerk, in her official capacity as City Clerk for the City of Watsonville. By Order dated April 8, 1986, all individual defendants were dismissed from the case and the caption was amended accordingly.

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THE CITY OF WATSONVILLE,

Petitioner,

– against –

DOLORES CRUZ GOMEZ, PATRICIA LEAL and WALDO RODRIGUEZ,

Plaintiffs-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner The City of Watsonville respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit for the reasons set forth below.

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Ninth Circuit dated July 27, 1988 is reported at 852 F.2d 1186 (9th Cir. 1988), and is also set forth in Appendix "A".

The amended opinion of the United States Court of Appeals for the Ninth Circuit dated December 7, 1988 is not reported but is set forth in Appendix "B". In this amended opinion the Court of Appeals revised and remanded the case back to the District Court. Petitioner's motion for a stay of the Court's mandate was denied on January 19, 1989, and the Order denying the motion is set forth in Appendix "C".

The relevant opinions and orders of the United States District Court for the Northern District of California were not reported but are set forth in Appendix "D".

JURISDICTION

The Order of the Court of Appeals denying The City of Watsonville's petition for rehearing, suggestion for rehearing *en banc* and for a stay of its mandate was entered on January 19, 1989. Appendix "C". This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to hold office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

Plaintiffs-Respondents filed this action in the United States District Court for the Northern District of California on May 21, 1985, against The City of Watsonville, its mayor, individual council members and City Clerk. By Order dated April 8, 1986, all individual defendants were dismissed and the caption amended accordingly.

A motion by Plaintiffs-Respondents for a preliminary injunction was denied on December 5, 1986 and, on January 16, 1987 the Plaintiffs-Respondents and Defendant-Petitioner filed their proposed findings of fact and conclusions of law.

District Court Judge Ingram issued his findings of fact and conclusions of law on January 30, 1987 and entered judgment in favor of Defendant-Petitioner on February 4, 1987. *See* Appendix "D." After further briefing and oral argument on the issue of geographical compactness, the Court's decision was supplemented on February 20, 1987. *See* Appendix "D-22".

The Plaintiffs-Respondents timely filed their appeal and on July 27, 1988 the Ninth Circuit Court of Appeals reversed the District Court findings and remanded the case to the District Court to implement a single member district plan and award

Plaintiffs-Respondents reasonable attorneys' fees and costs. The foundation of this decision centered in part on the Court taking judicial notice of so-called historical discrimination in the City of Watsonville and the State of California.

Defendant-Petitioner filed a petition for rehearing or reconsideration *en banc* on August 17, 1988. The basis for the petition was that it was improper for the Court to take judicial notice of historical discrimination without affording Defendant-Petitioner an opportunity to offer evidence in response to that question.

On December 8, 1988, the Court entered judgment denying Petitioner's petition for rehearing and rejected the suggestion for rehearing *en banc* (the opinion was dated December 7, 1988 but the judgment entered was dated December 8, 1988). Significantly, the Court acknowledged the impropriety of taking judicial notice of so-called historical discrimination without affording Appellee an opportunity to be heard on this question. Appendix "B-28 n.7".

In the December 7, 1988 opinion the Court of Appeals concluded that the only relevant inquiry to be made in determining whether there is a Section 2 violation is:

(a) whether there is racially polarized voting;

(b) whether the minority community is geographically compact; and

(c) whether the minority community is politically cohesive.

In so concluding, the Court held that examinaton of those *Zimmer* factors not subsumed into any of these elements was irrelevant and immaterial to the inquiry.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

In its analysis the District Court not only reviewed the three *Gingles* pre-conditions of geographical compactness, political

cohesiveness and racial polarized voting but also issued specific findings of fact with respect to the various factors set out by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297, *aff'd*, 424 U.S. 636 (1976). These so-called *Zimmer* factors can be summarized as follows:

1) The extent of historical-official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.

2) The extent to which voting in the elections of the state or political subdivision is racially polarized.

3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.

4) If there is a candidate slating process, whether the members of the minority group have been denied access to that process.

5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.

6) Whether political campaigns have been characterized by racial appeals.

7) The extent to which members of a minority group have been elected to public office in the jurisdiction.

8) Whether there is a lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

9) Whether the policy underlying the state or political subdivision's use of voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The findings of the District Court on each *Zimmer* factor can be summarized as follows:

1. There is *no* evidence of a history of vote related discrimination similar to that found by the district court in *Gingles*.

2. There is evidence to support a finding of racially polarized voting.

3. There is *no* evidence that the at-large council elections have enhanced the opportunity for discrimination against Hispanics by the use of majority vote requirements or prohibitions against one shot voting.

4. There is *no* candidate slating process.

5. No Hispanic has been elected to office.

6. There have been *no* racial appeals in election campaigns.

7. The City *has been* responsive to the needs of the Hispanic community.

8. There is no evidence that any differences in educational attainment, job opportunity, income or health benefits are the result of past discrimination of any kind, or that past discrimination has caused those factors to impede the ability of the Hispanic community to participate fully in the political process.

9. *No* evidence was offered on whether the use of at-large elections is tenuous.

Appendix "D" (emphasis added).

B. THE NINTH CIRCUIT'S MOST RECENT DECISION IS CONTRARY TO ALL OTHER CIRCUIT COURTS AND THE SUPREME COURT.

The Ninth Circuit has taken a bold new step in deciding this vote dilution case. It has gone beyond *Thornburg v. Gingles*, 478 U.S. 30 (1986), beyond *Zimmer v. McKeithen*, 424 U.S. 636 (1976), beyond *White v. Regester*, 412 U.S. 755 (1973), and beyond every other case decided before or after *Gingles*.

The Ninth Circuit acknowledged that "Appellants did not present any evidence of historical discrimination against Hispanics other than the socio-economic differences between Hispanics and Non-Hispanics stipulated to by the parties."[1] Appendix "A-18, 19".

The Ninth Circuit also acknowledged that the District Court found no evidence of official discrimination of any sort directed at the Hispanics of Watsonville "either presently or historically," Appendix "A-19"; and again the Court of Appeals found that:

> the Appellants did not present, and the record does not contain, sufficient evidence of historical discrimination against Hispanics to permit *this* Court to find that Watsonville Hispanics have suffered from discrimination.

Appendix "A-19".

Despite the Ninth Circuit's acknowledgement of the District Court's findings it nevertheless found a violation of the Act. This is the first time since the passage of the Voting Rights Act

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[1] The Court also ignores the evidence proffered by Petitioner through its expert Dr. Peter Morrison which clearly demonstrated that not all socio-economic disparities between Anglos and Hispanics are significant. For example, the disparity in value of Anglo housing versus the value of Hispanic housing is for the most part *de minimis*. In fact, the value of housing owned by Hispanics in census tract 1106 is $84.000 which is 15.5% higher than the median value of all housing throughout the City.

in 1965 that a Court upon such findings has reached this conclusion.

The Court held that to establish a Section 2 violation a plaintiff must only prove: the existence of significant racial polarized voting; that the minority community is geographically concentrated; and that the minority community is politically cohesive. This holding ignores those *Zimmer* factors which were the factual and legal predicate for the Supreme Court's holding in *Gingles*. It also ignores the clear and unambiguous language of *Gingles* when the Court said repeatedly that any inquiry into whether a particular electoral mechanism serves to dilute the voting strength of the minority community must have reference to the unique fact pattern in each individual community, a fact pattern that can only be analyzed in the context of these *Zimmer* factors.

The *Gingles* decision provided a basic outline under which vote dilution cases are to be evaluated. Taking its clue from the Senate Report, the Court stressed and restressed in a variety of language that an inquiry into whether a particular electoral mechanism serves to dilute the voting strength of the minority community must have reference to the unique fact pattern in each individual community. Citing directly to the Senate Report, the Court stated:

> "The question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' " *id.* at 30 (U.S.C. and Cong. and Admin. News 1982, p. 208).

478 U.S. at 45.

This requirement of an in depth review of "past and present reality," is one to which the Supreme Court would return several times in its opinion. *Id.* at 75-76, 78, 79.

Stating the issue slightly differently and once again borrowing from the language of the Senate Report, the Supreme Court stressed that inquiries into vote dilution are peculiarly fact sensitive and must have reference to the "Totality of the Circumstances." *Id.* at 43, 44 n.9, 46, 78 and 79.

The Ninth Circuit also ignores Justice Brennan's acknowledgment of the *Gingles'* District Court's findings on the requirements for a Section 2 violation. Justice Brennan held:

> The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; *the legacy of official discrimination in voting matters, education, housing, employment, and health services*; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice.

Id., at 80 (emphasis added) (also cited with approval by Justice Stevens (concurring and dissenting) 478 U.S. at 106).

Thus, the Supreme Court noted with approval the combination of proof of racial polarization, geographical compactness and political cohesiveness with proof of a "legacy of official discrimination in voting matters, education, housing, employment and health services". *Id.* at 80.

It is clear from this oft-quoted language of *Gingles* that Justice Brennan's opinion, joined in by Justices White, Marshall, Blackmun and Stevens, never intended the result reached by the Ninth Circuit here.

It should be further noted that Justice O'Connor, in her opinion concurring in the judgment, in which the Chief Justice, and Justices Powell and Rehnquist joined, rejected the narrow approach employed by the Ninth Circuit here. Justice O'Connor stated:

> I would adhere to the approach outlined in *Whitcomb* and *White* and followed, with some elaboration, in *Zimmer* and other cases in the Courts of Appeals prior to *Bolden*. *Under that approach, a court should consider all relevant factors bearing on whether the*

> *minority group has "less opportunity than other members of the" electorate to participate in the political process and to elect representatives of their choice.*

478 U.S. at 99 (emphasis added).

The Ninth Circuit also ignores the Fifth Circuit's holding on this issue. In *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987) the court specifically held that:

> We cannot agree that the Supreme Court in *Gingles* made the *Zimmer* analysis obsolete. In fact, the Court relied substantially on *Zimmer* as a foundation for the analytical framework prescribed for Section 2 claims.

834 F.2d at 498, and note 5.

The Supreme Court in *Gingles* did not hold that the *Zimmer* factors are irrelevant and immaterial to a vote dilution case. The Ninth Circuit here has misread footnote 15 and the accompanying test. What Justice Brennan said in footnote 15 is that even if a plaintiff proves: (1) minorities still suffer the social and economic effects of past discrimination; (2) appeals to racial bias are employed in election campaigns; and (3) a majority vote is required to win a seat, such proof is not sufficient to establish a Section 2 violation if there is no racial polarized voting and minorities are successful at the polls. Justice Brennan's statement in footnote 15 does not say that once you establish racial polarized voting, and that minorities are unsuccessful at the polls, the remaining *Zimmer* factors are irrelevant.

Some of the *Zimmer* factors are subsumed into an analysis of the three pre-conditions of *Gingles*, but those that are not subsumed must be evaluated and analyzed.

Two of the elements not subsumed are the history of discrimination against the relevant minority and the socio-economic disparities between the racial majority and the racial minority.

It is acknowledged by the Ninth Circuit that Plaintiffs here have only offered evidence on the three pre-conditions of *Gingles* and have deliberately failed to offer any evidence with respect to the *Zimmer* factors. The Ninth Circuit's refusal to acknowledge this failure of proof demonstrates the likelihood that at least four Justices of the Supreme Court would grant a petition for certiorari with a strong likelihood of reversal of the Ninth Circuit as this decision clearly goes beyond the holding of any of the nine Justices of the Supreme Court in *Gingles*.

The Ninth Circuit's rejection of all the *Zimmer* factors as irrelevant is further complicated by the Court's finding of geographical compactness and political cohesiveness.

C. GEOGRAPHICAL COMPACTNESS

The Court below again ignores the factual predicate found by the District Court in *Gingles* and the District Court in *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. ILL. 1987) in rejecting Petitioner's geographical compactness arguments. Simply put, both cases were class actions where procedural safeguards were available to those class members outside the minority districts. As the *Gingles* District Court stated:

> When, as here, such a class action is brought by a class which includes such a fragmented concentration of black voters, a *group judgment* about the group's best means of access to the political process must be assumed reflected in the specific claim made by the class. The legitimacy of that *group judgment*, from the standpoint of members of the class identified, can be put to test by standard procedures; by challenges to the adequacy of representation or the typicality of claims by any member of the identified class who questions the wisdom or validity of the class claim under Rule 23(A)(3) and (4), Fed. R. Civ. P., or even by attempted intervention under Rule 24, Fed. R. Civ. P.

Gingles v. Edmisten, 590 F. Supp. 345, 375 (E.D.N.C. 1984) (emphasis supplied).

In the instant action, three named individual Plaintiffs are seeking to nullify the votes of nearly two-thirds of the Hispanic population of the City of Watsonville. In fact, one of those Plaintiffs, aside from being named in the caption, has never participated in the prosecution of the lawsuit. This represents a far different situation from the standard class action with its panoply of procedural safeguards and the implication of class-wide judgment and support.

In *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill. 1987), nearly 75% of the black population *resided in* the areas of heaviest minority concentration. Similarly in *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), 65% of the black residents and 58% of the Hispanic residents *resided in* contiguous census tracts.

Compare this with Watsonville where 63.3% of the Hispanics of voting age are *outside* the majority districts. Also, the Ninth Circuit's reference to *Ketchum v. City Council of City of Chicago*, 630 F. Supp. 551 (N.D. Ill. 1985), is simply inapposite. The *Ketchum* opinion does not address issues of geographic compactness for a *de novo* determination of vote dilution, but rather a redistricting of the City of Chicago to conform its city council election wards to the 1980 census results. *Id.* at 557.

D. POLITICAL COHESIVENESS

On the question of political cohesiveness the Ninth Circuit equated the existence of racial polarized voting with political cohesiveness, citing Fourth and Fifth Circuit cases for that proposition while ignoring an Eleventh Circuit case that reaches a contrary conclusion. *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987). In *Stallings*, the Court of Appeals remanded the matter to the District Court to "provide the parties with an opportunity to present evidence of the political cohesiveness of black voters in Carroll County or the lack thereof." *Id.* at 1563. What is interesting in *Stallings* is the fact that the Court of Appeals had already concluded that significant racially polarized voting existed but refused to

conclude that was sufficient to establish political cohesiveness. The *Stallings* Court did note that "proof of racially polarized voting may, of course, be found sufficient by this Court to make the necessary finding of cohesiveness." *Id.* at 1563, n. 15. However, the Fifth Circuit was of the view that the existence of political cohesiveness was a factual issue to be addressed independently from a consideration of racially polarized voting. *Stallings* and *Gomez*, therefore, demonstrate a clear conflict among the circuits on this point which should be sufficient for this Court to grant a petition for certiorari to resolve the conflict.

CONCLUSION

It is clear from the foregoing analysis that the Ninth Circuit decision on the relevance of the *Zimmer* factors is contrary to all cases preceeding it. Because of the conflict between this Court and all other Circuit Courts and the Supreme Court, this petition for certiorari should be granted.

Also, the Court's analysis of geographical compactness and political cohesiveness demonstrates a split among the circuits which further supports this petition for a writ of certiorari. The Ninth Circuit's analysis of the issues raises questions not previously decided by the Supreme Court which are relevant to a full analysis of the burden of proof required in a voting rights case.

Therefore, for the reasons set forth above, we respectfully urge this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: New York, New York
January 25, 1989

Respectfully submitted,

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APPENDIX

APPENDIX A.

DECISION OF THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT,
JULY 27, 1988, NELSON, J.

Dolores CRUZ GOMEZ; Patricia Leal;
and Waldo Rodriquez,
Plaintiffs-Appellants

v.

The CITY OF WATSONVILLE; Ann Soldo, Mayor of the City of Watsonville; Rex Clark; Vido Deretich; Joe Marsano; Roy Ingersoll; Betty Murphy; Gwen Carroll, councilmembers of the City of Watsonville, in their official capacities as members of the City Council of the City of Watsonville; Lorraine Washington, City Clerk, in her official capacity as City Clerk for the City of Watsonville, California, Defendants-Appellees.

No. 87-1751

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 15, 1988
Decided July 27, 1988

Joaquin G. Avila, Fremont, Cal., Antonia Hernandez, Mexican American Legal Defense and Educ. Fund (MALDEF), Los Angeles, Cal., Jose Garza, MALDEF, San Antonio, Tex., Denise M. Hulett, MALDEF, Barbara Y. Phillips, Rosen and Phillips, Morris J. Baller, Marron, Reid and Sheehy, San Francisco, Cal., Jose Maria-Merino, Gretchen Regenhardt,

Legal Aid Society of Santa Cruz County, Inc., Todd McFarren, Watsonville, Cal., Rolanda Rios, Southwest Voters Registration and Educ. Project, San Antonio, Tex., for plaintiffs-appellants.

Charles Stephen Ralston, NAACP Legal Defense and Educ. Fund, Inc., New York City, James Robertson, Lawyers Committee for Civil Rights Under Law, Washington D.C., counsel for amici curiae.

Vincent R. Fontana, Wilson, Elser, Moskowitz, Edelman & Dicker, New York City, for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN and NELSON, Circuit Judges, and GILLIAM[1], District Judge.

NELSON, Circuit Judge:

Dolores Cruz Gomez, Patricia Leal, and Waldo Rodriguez ("Appellants") challenge the district court's ruling that the City of Watsonville's at-large mayoral and city council election system does not violate Section 2 of the Voting Rights Act as amended in 1982. 42 U.S.C. § 1973. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1343(a)(3) & (4). We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand for implementation of a plan that comports with Section 2.

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[1] Honorable Earl B. Gilliam, United States District Judge, Southern District of California, sitting by designation.

PROCEDURAL AND FACTUAL BACKGROUND

Appellants, Mexican-American citizens of Watsonville ("the City") eligible to vote, brought suit for declaratory and injunctive relief under 42 U.S.C. § 1973 ("Section 2"), 42 U.S.C. § 1983, and the fourteenth and fifteenth amendments. They have not appealed the district court's finding that no constitutional or § 1983 violations occurred. The appellants instead claim that the City's at-large system of mayoral and city council elections lessens the opportunity of Hispanics to participate in the political process and to elect representatives of their choice in violation of Section 2. Appellants seek implementation of a single-member districting plan to redress the alleged violation, and attorneys' fees and cost pursuant to 42 U.S.C. §§ 1973-(e) & 1988.

Appellants filed suit on May 21, 1985. On November 3, 1986, they filed a motion to enjoin the mayoral and city council election scheduled for May 1987. The district court denied this motion and held a trial from January 20-26, 1987. The district court found that racially polarized voting exists in Watsonville. However, the court did not find that the Hispanic community was sufficiently politically cohesive or geographically insular to meet the Section 2 test. The district court issued a decision in favor of the City on January 30, 1987, and affirmed that decision after further briefing on February 20, 1987. The court awarded attorney's fees and costs to the City. Appellants timely appealed.

The parties agree on many of the facts in this case. Appellants primarily challenge the district court's application of the legal standards governing Section 2 claims. The parties stipulated to the following facts, largely drawn from 1950-1980 census data.

The City is governed by the city council, comprised of six council members and a mayor. Persons are elected to these

positions on an at-large basis, with three council members elected each odd-numbered year. The three candidates with the highest number of votes are elected. Before the citizens voted for an at-large system in November, 1952, the City used a district or ward system.

According to the 1980 census, 48.9% of the City's population is Hispanic, 45.2% Anglo, 5.4% Asian and Pacific Islander, and 0.5% Black. In 1950, Hispanics comprised 1,001 persons in a total population of 11,373. As of 1980, 11,509 of Watsonville's 23,543 residents are Hispanic. Of those persons eighteen years and older, 40% are Hispanic and 60% non-Hispanic. However, Hispanics comprise only 37.0% of Watsonville's citizens because 41.5% of Hispanics in Watsonville are non citizens.

No Hispanic has ever been elected as mayor or city council member in Watsonville under the at-large system prior to the trial. Eight Hispanic candidates ran unsuccessfully for city council positions from 1971 to 1985 and one Hispanic ran for mayor in 1979.[2] Twenty-five of the 51 non-Hispanic candidates ran successfully for city council from 1971 to 1985. Hispanic persons have been appointed to City boards and commissions.

According to census date, many more non-Hispanics than Hispanics are employed in managerial and professional jobs in Watsonville. A fairly equal number of Hispanics and non Hispanics are employed as operators, fabricators and la-

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[2] After trial, one Hispanic was elected in May 1987 to the city council. However, this was inevitable because there were only two Anglo candidates, and three Hispanic candidates for three positions. This does not effect the validity of appellants' claim. *See Thornberg v. Gingles*, 106 S.Ct. 2752, 2780 & n. 37 (1986) (success of minority candidates at polls does not necessarily foreclose vote dilution claim.

borers. Many more Hispanics than non-Hispanics work in the farming, forestry and fishing industries in Watsonville. The number of Hispanics employed by the City itself has increased by 20% since 1973.

As of 1980, educational attainment levels differed among Hispanics and Anglos. Below are the number of persons 25 years and older completing school in the City.

		ANGLO	HISPANIC
Elementary		2,739	3,032
High School	(1-3 yrs.)	1,564	569
	(4 yrs.)	2,792	610
College	(1-3 yrs.)	1,728	311
	(4 or more yrs.)	1,064	171

Although the parties stipulated to the above facts, they do dispute the *significance* of socioeconomic characteristics of the City's Hispanic community derived from the census data. Appellants maintain that the evidence reveals large discrepancies between the City's Hispanics and non Hispanics in educational levels, income and employment. Appellants stress that the Hispanic population has lower educational attainment levels; are employed in lower status professions, or more commonly are unemployed, and have lower family incomes; and rent instead of own their homes twice as often as other City residents. Appellants also emphasize that of the Watsonville Hispanics over the age 5, 41% speak Spanish at home and approximately one-third do not speak English well or at all.

Appellees interpret the same statistics as showing less disparity between the two groups. They emphasize the increasing level of education among Hispanics during the 1970s and the increasing level of employment of Hispanics by the City itself in recent years. However, appellees fail to compare those figures to the education and employment levels of the

City's non-Hispanics. Appellees also emphasize disparities within the City's Hispanic population. For example, they note that lower and higher income Hispanic residents sometimes reside in the same census tracts, and that the Hispanics who do own homes own those of comparable value to those owned by non Hispanics.

STANDARD OF REVIEW

[1] In analyzing a Section 2 claim, we review the district court's factual findings under the clearly erroneous standard of Fed.R.Civ.P. 52(a). *Thornberg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 2781-82, 92 L.Ed.2d 25 (1986). However, "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so called mixed finding of law and fact, or a finding that is predicated on a misunderstanding of the governing rule of law.'" *Id.* at 2782 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501, 104 S.Ct. 1949, 1960, 80 L.Ed.2d 502 (1984)).

ANALYSIS

I. SECTION 2 VIOLATIONS

[2] The Supreme Court first interpreted the 1982 amendments to Section 2 of the Voting Rights Act of 1965 in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25(1986).[3] Seven factors are typically probative of a Section 2 violation:

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[3] The 1982 amendments mandate that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a

(Footnote continued)

1. The extent of any history or official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large

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manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973, as amended, 96 Stat. 134.

election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state of political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.Code Cong. & Admin.News 177, 206-07.[4] "[T]his

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[4] These factors are derived from *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), as developed by *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam). *Gingles*, 106 S.Ct. at 2759 n. 4.

list of typical factors is neither comprehensive nor exclusive."*Gingles*, 106 S.Ct. at 2764. "'[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'" *Id.* (quoting S.Rep. No. 417 at 29, 1982 U.S.Code Cong. & Admin.News at 207). The Court in *Gingles* found two of the Report's seven factors to be predominant in Section 2 analysis. The Court emphasized proof of "*racially polarized voting*, which establishes both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates, and the *actual results* of minority-preferred candidates in winning elections." *Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987), on remand from *Collins v. City of Norfolk*, --- U.S. ---, 106 S.Ct. 3326, 92 L.Ed.2d 733 (1986) (vacating *Collins v. City of Norfolk*, 768 F.2d 572 (4th Cir. 1985). The Court noted that, "[i]f present, the other factors . . . are supportive of, but *not essential to* a minority voter's claim." *Gingles*, 106 S.Ct. at 2766 n. 15.

[3] To ensure that it is actually the electoral device that impedes the ability of minorities to elect representatives of their choice, the appellants must establish certain prerequisites to maintain a Section 2 claim. At a threshold level, they must demonstrate a conjunction of the following circumstances:

> (1) That [the minority group] is sufficiently large and geographically compact enough to make a majority, if it were voting a single-member district; (2) that it is politically cohesive; and (3) that the majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as an unopposed minority candidate -- *usually* to defeat the minority's preferred candidate.

Collins, 816 F.2d at 935 (citing *Gingles*, 106 S.Ct. at 2766). "The second and third parts, cohesion and majority bloc vot-

ing, are usually proven by statistical evidence of racially polarized voting." *Campos v. City of Baytown, Texas*, 840 F.2d 1240, 1243 (5th Cir.1988).

II. APPLICATION OF GINGLES

The district court here found that racially polarized voting exists in Watsonville. It relied on appellants' expert, Dr. Bernard Grofman, who analyzed the census data and concluded that voting is racially polarized in Watsonville. *Cf. Gingles*, 106 S.Ct. at 2767-71 (relying on similar testimony from Dr. Grofman in upholding the trial court's finding of legally significant racially polarized voting). The district court found the evidence of racially polarized voting here "essentially uncontradicted" and found Dr. Grofman's methodology "completely without criticism."

However, the court ruled against appellants. It found Watsonville's Hispanic population insufficiently geographically compact to meet the threshold requirements of a Section 2 claim. The district court recognized that the Hispanics have the potential to control two single-member districts, but rejected appellants' vote dilution claim because the majority of Hispanics would still reside in Anglo-controlled districts in which their vote was ineffective.

The district court also found that appellants failed to demonstrate sufficient political cohesiveness among the Watsonville Hispanics. Although the court found that 95% of Hispanic voters vote for the same candidates, the court considered low voter registration and turnout among Hispanics, and concluded that all Hispanics *eligible* to vote might not all vote alike. Further, the court found that socioeconomic differences and differences in political opinion supported a conclusion that Hispanics had shown low enthusiasm for past Hispanic candidates and this, in turn, undermined political cohesiveness.

The district court appears to have misunderstood the proper legal inquiry after the 1982 amendments. Because this circuit has not addressed the issues presented by this appeal since the Supreme Court applied the 1982 amendments to an at large system in *Gingle*, we will review each element.

A. *Section 2 Threshold Requirements*

1. *Geographic Concentration of Hispanics*

To establish the first prerequisite to a Section 2 claim, a minority group "must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 2766. As the district court recognized, Watsonville's at-large scheme is the functional equivalent of the electoral scheme at issue in *Gingles*. Thus, we use the single-member district as the measure in evaluating whether Watsonville's at-large procedure is resulting in vote dilution. "The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." *Id.* at 2767 n. 17. Without the potential to elect representatives of their choice, appellants cannot demonstrate injury as a result of the at-large procedure. *Id.*

Dr. Grofman demonstrated that 68.3% of the City's Hispanic population resides in three of nine census tracts. He analyzed the number of Hispanic eligible to vote, considering the age and citizenship requirements, and concluded that they are compact geographically. Appellees have not refuted these statistical findings on appeal. The district court found, however, that Watsonville Hispanics are not sufficiently geographically insular because appellants' proposed plan includes only two districts that would have contained a majority of Hispanic voters. The district court reasoned that because the plan would alleviate vote dilution for only one-third of the

Hispanics eligible to vote, the appellants had not shown geographic insularity.

[4] The district court erred in considering that approximately 60% of the Hispanics eligible to vote in Watsonville would reside in five districts outside the two single-member, heavily Hispanic districts in appellants' plan. Districting plans with some members of the minority group outside the minority-controlled districts are valid. *See, e.g., Ketchum v. City Council of City of Chicago,* 630 F.Supp. 551, 557 (N.D. Ill. 1985); *Gingles v. Edmisten*, 590 F.Supp. 345, 357-59 (E.D.N.C. 1984) (district court opinion affirmed in part by the Supreme Court in *Gingles*). "The fact that there are members of the minority group outside the minority district is immaterial." *Campos*, 840 F.2d at 1244.

[5] The appellants' plan proposes two districts in which Hispanics would constitute a majority of the voters and would be able to elect representatives of their choice. It is ironic for the district court to conclude that because many Hispanic voters would still not be able to elect representatives of their choice under the proposed plan, no Section 2 claim could be maintained, thereby relegating all Hispanic voters to having no political effectiveness. The district court's finding is premised on a misunderstanding of the applicable legal definition. The Hispanics in Watsonville are capable of carrying a district under the *Gingles* standard and the court's finding that the group is not sufficiently geographically compact is therefore clearly erroneous. Appellants have demonstrated the first part of the threshold requirements.

2. *Political Cohesiveness of Hispanics*

[6] As a second threshold requirement, appellants must demonstrate that Watsonville Hispanics are politically cohesive. The district court found that 95% of the Hispanic voters in heavily Hispanic precincts support Hispanic candidates and that Hispanic voters ranked Hispanic candidates first or tied for first. Although the district court here found that "in actual[ity] those Hispanics who have voted have tended to vote for the same Hispanic candidates," the district court concluded that the Hispanic community is not politically cohesive.

The district court erred in concluding that Hispanics are not politically cohesive after finding that Watsonville Hispanics do vote as a bloc. The court recognized its duty to look at the actual voting patterns, *see, e.g., Campos,* 840 F.2d at 1245-47, but was swayed by the "apparent disinclination of Hispanics of voting age and citizenship to register and/or turn out to vote."

Dr. Grofman testified that Hispanics voted the same way in substantial proportion in the elections analyzed. Dr. Grofman testified that this racial bloc voting is the primary factor in evaluating political cohesiveness but pointed to other socioeconomic and cultural differences between Hispanics and non-Hispanics contributing to the political cohesiveness of Hispanics in the City. He also pointed to evidence of single-shot voting (where minority members vote only for certain candidates and do not use their remaining votes) among Watsonville Hispanics to reinforce his conclusion.

Appellees argue that the Hispanics are not politically cohesive and that appellants are not representative of Hispanics in Watsonville. The appellee's expert, Dr. Peter Morrison, and two lay Hispanic witnesses testified to the existence of political differences within the Watsonville Hispanic community. Dr. Morrison concluded that he would "not

expect . . . to find all Hispanics in Watsonville voting alike." He based this projection on socioeconomic differences among Hispanics and the failure of some eligible Hispanics to register and/or vote. Appellee's witnesses, whom the district court found credible, enumerated reasons that members of the Hispanic community did not always support Hispanic community did not always support Hispanic candidates enthusiastically. The district court appeared to rely on testimony that socioeconomic disparities and differences in political opinion among Hispanics detracted from political cohesiveness as support for Dr. Morrison's projection.

However, that projection concerned *eligible* voters rather than actual voters. The district court should have looked only to the *actual voting patterns* before it rather than focusing on all eligible voters. The district court expressly found that actual minority voters consistently preferred different candidates than the Anglo voters. It found that predominantly Hispanic sections nearly unanimously support Hispanic candidates. This establishes the requisite political cohesion of the minority group. As the Supreme Court advised: "A showing that a significant number of minority group members usally vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim . . ." *Gingles*, 106 S.Ct. at 2769-70 (citation omitted). *See also Collins*, 816 F.2d at 935 ("The court should inquire separately into minority and majority voting, to see whether members of the minority usually vote for the same candidates -- if so, there is the requisite minority political cohesiveness . . ."

[7] Moreover, the district court erred by focusing on low minority voter registration and turnout as evidence that the minority community was not politically cohesive. Voter apathy is not a subject of judicial notice. *United States v. Dallas County Comm'n*, 739 F.2d 1529, 1536 (11th Cir. 1984); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 & n. 13 (5th Cir.)(en banc), *cert. denied*, 434 U.S. 968, 98

S.Ct. 512, 54 L.Ed.2d 454 (1977). And contrary to the court's supposition that low voter turnout may be a "substantial factor" in the failure to elect Hispanic candidates in Watsonville, low voter registration and turnout have often been considered evidence of lack of minority voters' *ability* to participate effectively in the political process. *See Gingles*, 106 S.Ct. at 2760-61. In fact, depressed registration rates may be traceable in part to historical discrimination. *Id.* at 2761; *Dallas County*, 739 F.2d at 1538; *see also Buckanaga v. Sisseton Independent School Dist.*, 804 F.2d 469, 475 (8th Cir. 1986) (low voter registration evidences the lingering socioeconomic effects of past discrimination). Here, the appellants presented testimony that Hispanic disinclination to register or to vote is a concomitant of the dilutive at-large procedure. The evidence in the record is insufficient to support the district court's conclusion that possible lack of enthusiasm for Hispanic candidates allegedly resulting in low voter turnout, rather than the at-large system, is responsible for lack of minority electoral success in Watsonville. *See Dallas County*, 739 F.2d at 1536.

[8] The district court's reliance on socioeconomic disparities and political opinion differences within the Hispanic community as support for Dr. Morrison's projection was also erroneous. Such differences within the community are only relevant differences in voting behavior among Hispanics. Here, however, the district court found that Hispanics vote alike and coalesce behind Hispanic candidates. In light of *Gingles*, the Fifth Circuit has recently considered groups of Blacks and Hispanics politically cohesive for purposes of Section 2 violations. *Campos*, 840 F.2d at 1245-47; *League of United Latin American Citizens v. Midland Independent School Dist.*, 812 F.2d 1494, 1500 (5th Cir.) *vacated and affirmed on other grounds*, 829 F.2d 546 (1987). Despite the many ethnic and cultural differences between Blacks and Hispanics, the two groups were found to have "political goals that are inseparable." *Id.* The defendants in *Midland* offered a survey indicating that Blacks and Hispanics have mutually ex-

clusive interests and are politically distinct groups. The Fifth Circuit, however, emphasized that "the survey does not prove that the two minority groups would *vote differently* in any particular election in which a member of one of their groups is a candidate against an Anglo . . ." *Id.* at 1501 (emphasis added). A finding that Hispanics vote for different candidates than do non-Hispanics, as in evidence here, is ample support for political cohesiveness.

In the face of the actual voting patterns validated by the district court, its finding of noncohesiveness based on Dr. Morrison's projection that not all Hispanics are *likely* to vote alike, and on testimony about the differences within the Hispanic community was clearly erroneous. Appellants have established the requisite political cohesiveness among the minority group to overcome the second threshold requirement.

3. *Racial Bloc Voting Among Majorities*

[9] Finally, to maintain a Section 2 claim appellants must demonstrate racial bloc voting among the majority. "[A] white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 106 S.Ct. at 2770; *see also Campos*, 840 F.2d at 1248-49.

As noted above, 60% of Watsonville residents over age 18 are non-Hispanic and 41.5% of the Hispanics in Watsonville are non-citizens. The district court found that only an average of 13% of the voters in predominantly Anglo precincts vote for Hispanic candidates while 95% of the Hispanic voters in heavily Hispanic precincts support Hispanic candidates. The court also found that Anglo voters ranked Hispanics last or near last while Hispanic voters ranked Hispanic candidates first or tied for first.

Time is also probative in establishing a pattern of racial bloc voting. The Court in *Gingles* found persuasive a series of elections where the minority group had sponsored candidates without electoral success. *Id.* at 2770. The parties here have stipulated that a similar pattern exist in Watsonville.

The district court accepted those statistics and held that racial bloc voting occurs in the City. The court found strong evidence of Hispanics and Anglos supporting different candidates. Although the court did not separately find that Anglo bloc voting occurs, it is clear that the non Hispanic majority in Watsonville votes sufficiently as a bloc usually to defeat the minority votes plus any crossover votes.

B. *The Totality of the Circumstances*

Appellants have met the threshold requirements. However, they will prevail only if, when we examine the Senate factors, as well as other relevant factors, the totality of the circumstances show that Watsonville Hispanics "do not have an equal opportunity to participate in the political processes and to elect candidates of their choice" because of the at-large system. *Gingles*, 106 S.Ct. at 2763. If the totality of the circumstances reveal a Section 2 violation, the district court's denial of relief cannot be supported.

[10] We will first examine the two Senate factors found predominant by the Court in *Gingles*: racially polarized voting and a lack of minority electoral success. Then we will examine the other Senate factors.

1. *Racially Polarized Voting*

The *Gingles* Court stated that the purpose of the racially polarized voting inquiry is: "to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to

defeat the minority's preferred candidates." *Gingles*, 106 S.Ct. at 2769.

As discussed above, appellants have demonstrated that Watsonville Hispanics are politically cohesive and that Anglo bloc voting occurs at a legally significant level. The district court correctly found that racially polarized voting exists in Watsonville.

2. *Minority Electoral Success*

The other predominant component to Section 2 analysis as set forth by the Court in *Gingles* focuses on the actual results of minority-preferred candidates in elections. As the parties here stipulated, no Hispanic had ever been elected as mayor or city council member under the at-large system prior to the trial. Eight Hispanic candidates ran unsuccessively for city council positions from 1971 to 1985 and one Hispanic ran for mayor in 1979. Twenty-five of 51 non-Hispanic candidates ran successively for city council positions from 1971 to 1985. Such a pattern over time of no minority electoral success strongly indicates racial bloc voting. *Gingles*, 106 S.Ct. at 2770.

Appellants have clearly shown the requisite lack of minority electoral success and racially polarized voting necessary to establish a Section 2 violation.

3. *Official Discrimination and its Effects*

[11] The first and fifth Senate factors are a history of official discrimination against the minority group and the extent to which the minority continues to bear the effects of discrimination in socioeconomic areas which hinder their ability to participate in the political process effectively. *See supra* 6-7. Appellants did not present evidence of historical discrimination against Hispanics other than the socioeconomic differences

between Hispanics and non Hispanics stipulated to by the parties because they believed that they amply demonstrated a Section 2 violation. We agree. Factors other than minority electoral success and racially polarized voting are not necessary to establish a Section 2 violation. They are nonetheless supportive of a vote dilution claim. *Gingles*, 106 S.Ct. at 2766 n. 15. We therefore consider whether these factors are present in this case.

The district court found "no evidence whatever of official discriminatory practices of any sort directed at the Hispanic residents of Watsonville, either presently or historically." It emphasized that the City government had not been unresponsive to the needs of Hispanics and that the City has been "singularly free of overt discrimination against Hispanics" during the thirty-year period covered by the evidence. Further, the court found "no evidence that any differences in educational attainment, job opportunity, income or health benefits are the result of past discrimination of any kind, or that past discrimination has caused those factors to impede the ability of the Hispanic community to participate in the [political] process."

[12] The district court erred in denying the existence of official discrimination. Watsonville Hispanics have suffered from past official discrimination and they continue to bear the effects of discrimination which hinder their political access. Although the district court record on this issue is not complete, we take judicial notice of the ubiquitous historical and current racial discrimination against Hispanics in this part of the United States.

The district court erroneously emphasized the recent good intentions of the City without considering widespread past discrimination. It overlooked a denial of access to the political process by focusing on whether the at-large system was implemented with the *intent* to dilute Hispanic voting strength. *See Gingles*, 106 S.Ct. at 2759. Further, "[t]he fact that some

[discriminatory] laws have been changed within the past few years or months does not answer or offset the fact that the voting patterns remain firm. Because they were denied access to the political processes through years of discrimination, the Mexican-Americans do not now register and vote in overwhelming numbers." *Graves v. Barnes*, 343 F.Supp. 704, 733 (W.D. Tex. 1972), *aff'd in relevant part, White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (holding that Mexican Americans in Texas historically suffered from, and continue to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, and politics). We cannot approve ignoring past discrimination because of recent reforms. *See, e.g., Romero v. City of Pomona*, 665 F.Supp. 853, 861 (C.D. Cal. 1987) (rejecting a vote dilution claim because "evidence regarding any history of past discrimination [against Hispanics] in California and in the City of Pomona . . . have been mitigated by intensive efforts of the California Legislature to improve minority voting participation and to liberalize the political process").

We assume that had the district court considered the history of discrimination, rather than just recent reforms, it would have reached an opposite conclusion. Discrimination against Hispanics in California and the Southwest has pervaded nearly all aspects of public and private life. "'The situation of Mexican Americans in the Southwest is comparable to that of blacks in the South. They have historically been the victims of violence, state-sanctioned segregation in schools and housing. Jim Crow practices and job discrimination. Today they are still widely excluded from effective political participation.'" *Midland,* 812 F.2d at 1500 n. 13 (quoting Davidson, "Minority Vote Dilution, An Overview" in *Minority Vote Dilution* (C. Davidson ed. 1984). "The United States Supreme Court has long recognized that Chicanos, as well as Blacks, require the protective intervention of the Federal Courts." *Graves*, 343 F.Supp. at 727. *See also Hernandez v. Texas*,

347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (exclusion of Hispanics from jury service held unconstitutional).

This discrimination has touched the right of California Hispanics to vote and to participate in politics. For example, "fear and hatred played a significant role" in the legislature's English literacy voting requirement. *Castro v. State*, 2 Cal.3d 223, 231, 466 P.2d 244, 85 Cal.Rptr. 20, 25 (1970) (California constitutional provision requiring ability to read English as prerequisite or voting declared unconstitutional as applied to those literate in another language). The California Supreme Court noted "the narrow and fearful nativism rampant in California politics at the end of the Nineteenth Century." *Id.* at 228, 85 Cal.Rptr. at 23. California cites held English-only elections and did not supply an adequate number of bilingual election clerks until recent years. In 1975, Congress extended the Voting Rights Act to "language minority citizens" and provided for bilingual elections. Congress was concerned about the racial, cultural and language barriers to electoral and economic participation of Hispanics in the Southwest. S.Rep. No. 295, 94th Cong., 2d Sess. 24-39, *reprinted in* 1975 U.S.Code Cong. & Admin.News 774, 1975 U.S.Code Cong. & Admin.News 774, 790-806. *See also Buckanaga*, 804 F.2d at 477 (absence of minority election clerks indicative of official unresponsiveness to minorities); *Sierra v. El Paso Independent School Dist.*, 591 F.Supp. 802, 807 (W.D. Tex. 1984) (English-only election a form of past discrimination).

California has discriminated against Hispanics by limiting their access to education. *Los Angeles Unified School Dist. v. United States District Court*, 650 F.2d 1004, 1005 (9th Cir. 1981) (Ferguson, J., dissenting) (citing state-sanctioned segregation of blacks, Hispanics and other minorities in California's public schools from the 1800s to 1960s); *see also Crawford v. Board of Educ.*, 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976) (history of school desegregation litigation throughout California); *Westminster v. Mendez*, 161

F.2d 774 (9th Cir. 1947) (en banc) (discrimination against persons of Mexican descent in schools). This undoubtably contributes to the low educational attainment, reading achievements and extracurricular activities among Hispanic school children noted by the United States Commission on Civil Rights. Romo & Romo, "Introduction" in *The Mexican American Experience: An Interdisciplinary Anthology*, 317, 322 (R. de la Garcia, F. Bean, C. Bonjean, R. Romo & R. Alvarez eds. 1985) ("*The Mexican American Experience*"). The parties have stipulated to the low educational attainment levels of Watsonville's Hispanic population. See chart at 9219, *supra*.

Discrimination in social settings and employment have hindered and continue to harm Hispanics. *See, e.g., Gutierrez v. Municipal Court of Southeast Judicial Dist., County of Los Angeles,* 838 F.2d 1031 (9th Cir. 1988) (injunction against English-only rule in court offices); *De Ronde v. Regents of University of California*, 625 P.2d 220, 226, 28 Cal.3d 875, 172 Cal.Rptr. 677, 683 (1981) (describing social discrimination against ethnic minorities in California); *Martinez v. Superior Court for Placer County*, 108 Cal.App.3d 695, 761-62, 166 Cal.Rptr. 756 (1980) (Reynoso, J., dissenting) (taking judicial notice of the historic discrimination against Chicanos in California); J. Moore & H. Pachon, *Mexican Americans* 29, 93 (2d ed. 1976) ("*Mexican Americans*") (discrimination by police in race riots of 1940s); *id.* at 91-96 (discussion of Civil Rights Commission report on Chicano treatment in the criminal justice system); McLemore & Romo, "The Origins and Development of the Mexican American People" in *The Mexican American Experience* 3, 20-21 (disportionately high enlistment and casualty rates of Hispanics servicemen in World War II); Guzman, "Mexican-American Casualties in Vietnam" in *A Documentary History of the Mexican Americans* 371-73 (W. Moquin & C. Van Doren eds. 1971) ("*A Documentary History*"; *Lopez v. Seccombe*, 71 F.Supp. 769 (S.D. Cal. 1944) (exclusion of persons of

Mexican descent and nationals of Latin countries from public park and swimming facilities); C. McWilliams, *North From Mexico* 239-40 (1949) (refusals to admit Hispanics to social and recreational facilities in California).

These facts can leave no doubt that Hispanics in California have been subject to widespread discrimination for many years. This history is more than sufficient to meet the first Senate factor. We also find that Watsonville Hispanics bear the effects of this discrimination, and appellants have thus established the presence of the fifth Senate factor. Low voter registration and turnout levels are indicative of lingering effects of past discrimination. *Gingles*, 106 S.Ct. at 2761; *Dallas County*, 739 F.2d at 1538; *Buckanaga*, 804 F.2d at 475. Congress added a footnote to the Senate factor addressing the extent to which minorities continue to bear the effects of discrimination. Congress noted: "The courts have recognized that disportionate educational employment, income, and living conditions arising from past discrimination tend to depress minority political participation, e.g. *White*, 412 U.S at 768 [93 S.Ct. at 2340] . . . Where these conditions are shown, and where the level of [minority] participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." S.Rep. No. 417 at 29 n. 114, 1982 U.S.Code Cong. & Admin. News at 207. *See also* Hartman, *Racial Vote Dilution*, 50 Geo.Wash.L.Rev. 689, 727-29 (1982); essays in *The Mexican American Experience* 183-313 (documenting political participation of Hispanics). It is undisputed that the Hispanics in Watsonville have lower educational attainments levels; are employed in lower status professions, more commonly unemployed, and have lower family incomes; and more commonly rent than owns homes. *Cf. Mexican Americans* at 54-87 (discussing lower educational levels and overcrowded, dilapidated housing of many Hispanics); Bean, Stephen & Opitz, "The Mexican Origin Population in the United States: A Demographic

Overview" in *The Mexican American Experience* 57-75 (based on 1980 census data); Reimers, "The Wage Structure of Hispanic Men" in *The Mexican American Experience*, 118-32 (based on 1976 Survey of Income and Education); Ortiz & Cooney, "Sex Role Attitudes and Labor Force Participation" in *The Mexican American Experience* 174-82 (poor educational attainment contributing to lower labor force participation).

The Supreme Court has instructed that relevant circumstances in addition to the Senate factors should be considered. *Gingles*, 106 S.Ct. at 2764. It has noted that a "typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult, particularly . . . with respect to . . . political life." *White*, 412 U.S. at 768, 93 S.Ct. at 2340. The language barrier for most Watsonville Hispanics hinders political participation. In the 1982 amendments to the Voting Rights Act Congress emphasized that language minorities are often prevented from participating fully in the political process. 42 U.S.C. § 1973b(f)(1). Hispanics have sought bilingual elections and increased bilingual election clerks from the City. Appellants maintain that only 3% of the election clerks were bilingual from 1953-85. Ten percent of the clerks were bilingual in the 1985 election.

Further, many of Watsonville's Hispanics have immigrated only recently to California. California's substantial resident alien population is "'a class which has historically been subject to discrimination against them *both because of their alienage and their race*.'" *Rubio v. Superior Court of San Joaquin County*, 24 Cal.3d 93, 119, 593 P.2d 595, 154 Cal.Rptr. 734, 751 (1979) (Newman, J., dissenting) (quoting California Rural Legal Assistance letter of Oct. 16, 1978). The frequent migratory movements of Hispanic persons in California's history reflects the history of discrimination against them in the state. *See, e.g. A Documentary History* at 294-97, 342-48, 363-65 (discussing California's repatriation

of migrant workers and native-born Hispanics; temporary importation of agricultural laborers; and poor working conditions and strikes among such workers); Keely, "Immigration and the American Future", in *Ethnic Relations in America* 28-65 (L. Liebman ed. 1982) (immigration law and statistics since 1950s); Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L.Rev. 303, 304 & n. 6 (1986) (discussing increasing immigration from Latin America in past two decades); *Mexican Americans* at 31-53 (history of immigration in Southwest). The California legislature implemented a tax against Mexican miners in the mid-nineteenth century. *See North From Mexico* at 127-28; Mexican Americans at 18 (Mexicans "taxed, lynched, robbed and expelled"). The federal and state governments intervened to settle grant disputes between Hispanics owning land in California and incoming Anglo settlers in the 1800s. *Mexican Americans* at 18-20; Hittell, "Mexican Land Claims in California" in *A Documentary History* 199-205 (concluding that congressional Land Committee heavily favored Anglo land seekers).

Reviewing the totality of the circumstances, it is obvious to us that the district court's conclusions on discrimination are clearly erroneous. Watsonville Hispanics have suffered from historical discrimination and they continue to bear the effects of discrimination which hinder their political participation.

4. *Other Senate Factors*

[13,14] The district court found that the third Senate factor was not present, emphasizing that Watsonville does not employ electoral devices with the potential to dilute minority voting strength such as an anti-single shot voting requirement or a majority vote requirement. However, the third Senate factor also includes "unusually large election districts" as a disfavored voting procedure. It is not disputed that an at

large system in Watsonville.[5] The parties also stipulated to the lack of a district residency requirement for mayoral or city council candidates. The absence of a district residency requirement can hinder the political access of minority groups because all the candidates can come from outside minority neighborhoods. *See Rogers v. Lodge*, 458 U.S. 613, 627, 102 S.Ct. 3272, 3280, 73 L.Ed.2d 1012 (1982); *White v. Regester*, 412 U.S. 755, 766 n. 10, 93 S.Ct. 2332, 2340 n. 10, 37 L.Ed.2d 314 (1973). Therefore the third Senate factors was present, at least in part.

The district court correctly found that no evidence of the fourth and sixth Senate factors, exclusion from the candidate slating process or the use of racial appeals in campaigns, had been shown.

The Supreme Court and the Senate Report have cautioned that there is no requirement that "'any particular number of factors be proved, or that a majority of them point one way of the other.'" *Gingles*, 106 S.Ct. at 2764 (quoting S.Rep. No. 417 at 29, 1982 U.S.Code Cong. & Admin. News at 207). Thus, we do not need to resolve definitely the import of each of the Senate Report factors. We conclude that appellants have established clearly a violation of Section 2.

We remand for implementation of a plan that comports with Section 2. The district court has broad equitable powers to fashion relief which will remedy the Section 2 violation completely. *See* S.Rep. No. 417 at 31, 1982 U.S.Code Cong. & Admin.News at 208.

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[5] Of course, at-large districts are not per se violative of Section 2. Plaintiffs must demonstrate vote dilution based upon a totality of the circumstances. *Gingles*, 106 S.Ct. at 2764; *see* S.Rep. No. 417, 97th Cong., 2d Sess. 16, 28-29, 33 *reprinted in* 1982 U.S.Code Cong. & Admin. News 177, 193, 205-206, 211.

III. ATTORNEYS' FEES

[15] Appellants request attorneys' fees and costs for this appeal pursuant to 42 U.S.C. §§ 1973-(e) & 1988. The district court awarded the costs of suit to the City. "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988; *see also id.* § 1973-(e). Attorneys' fees can be awarded at the trial or appellate level to prevailing parties under 42 U.S.C. § 1988. *See Sotomura v. County of Hawaii*, 679 F.2d 152 (9th Cir. 1982). Attorneys' fees should be awarded in vote dilution claims unless special circumstances make such an award unjust. *Campaign for a Progessive Bronx v. Black*, 631 F.Supp. 975, 980 (S.D.N.Y. 1986).

[16] Appellants are clearly the prevailing party in this litigation and no special circumstances prevent an award in this case. We thus reverse the district court's award of costs to appellees. On remand, the district court should award appellants costs and reasonable attorneys' fees, including the fees incurred in pursuing this appeal. The court should determine the appropriate amount after implementation of a plan that does not violate Section 2.

CONCLUSION

We reverse the district court's judgment in favor of the City because of its legal misunderstandings and erroneous findings of insufficient geographical insularity and political cohesiveness. We find that, based on the totality of the circumstances, the at-large scheme of mayoral and city council elections in Watsonville impermissibly dilutes the voting strength of Hispanics. We remand for implementation of a plan that comports with Section 2's requirements.

REVERSED AND REMANDED.

APPENDIX B.

ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, DECEMBER 7, 1988, NELSON, J.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOLORES CRUZ GOMEZ, PATRICIA LEAL, and WALDO RODRIGUEZ,

Plaintiffs-Appellants,

v.

CITY OF WATSONVILLE: ANN SOLDO, Mayor of the City of Watsonville; REX CLARK; VIDO DERETICH; JOE MARSANO; ROY INGERSOLL; BETTY MURPHY; GWEN CARROLL,councilmembers of the City of Watsonville, in their official capacities as members of the City Council of the City of Watsonville; LORRAINE WASHINGTON, City Clerk, in her official capacity as City Clerk for the City of Watsonville, California,

Defendant-Appellees.

NO. C-87-1751

D.C. No.
CV-85-20319-WAI

B-2

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court

for the Northern District of California

William A. Ingram, District Judge, Presiding

Argued and Submitted

January 15, 1988---San Francisco, California

Filed July 27, 1988

Amended December 7, 1988

14937

Before: Alfred T. Goodwin and Dorothy W. Nelson,

Circuit Judges, and Earl B. Gilliam[1], District Judge.

Opinion by Judge Nelson

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[1] Honorable Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

SUMMARY

Constitutional Law/Elections

Reversing and remanding a judgment finding the City of Watsonville's at-large mayoral and city council election system not violative of Section 2 of the Voting Rights Act, the court held that the City's at-large scheme of mayoral and city council elections impermissibly dilutes Hispanics' voting strength.

The court amended its previous opinion and with the opinion so amended, denied the petition for rehearing and rejected the suggestion for rehearing en banc. Appellants, Mexican-American citizens of Watsonville, claim that the City's at-large system of mayoral and city council elections lessens the opportunity of Hispanics to participate in the political process and to elect representatives of their choice in violation of Section 2 of the Voting Rights Act. They seek implementation of a single-member districting plan to redress the alleged violation. Although finding racially polarized voting in the City, the district court did not find that the Hispanic community was sufficiently politically cohesive or geographically insular to meet the Section 2 test. No Hispanic had ever been elected as mayor or city council member in Watsonville under the at-large system prior to the trial.

[1] The Senate Judiciary Committee Report accompanying the act that amended Section 2 listed seven guiding objective factors that might be probative of a violation under the totality of the circumstances test. [2] The range of relevant factors in any given case will vary depending upon the nature of the claim and the facts of the case. [3] The Supreme Court first interpreted the 1982 amendments to Section 2 in *Thorn-*

burg v. Gingles 478 U.S. 30 (1986). [4] The first element of a Section 2 challenge to an at-large voting scheme is a showing that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district. [5] The Hispanics in Watsonville are capable of constituting a majority in at least one district, and therefore the lower court's finding that the group is not sufficiently geographically compact is erroneous. [6] The *Gingles* test second requirement is that appellants show that Watsonville Hispanics are politically cohesive. [7] This issue is judged primarily on the basis of the voting preferences expressed in actual elections. [8] The district court erred by focusing on low minority voter registration and turnout as evidence that the minority community was not politically cohesive. The court should have looked only to *actual voting patterns*. [9] Looking to this, predominantly Hispanic sections of Watsonville have, in actual elections, demonstrated near unanimous support for Hispanic candidates. This established the requisite political cohesion of the minority group. [10] Thus, appellants have established the second element of the *Gingles* test. [11] Finally, appellants must demonstrate racial bloc voting among the majority. [12] The evidence shows that the non-Hispanic majority in Watsonville usually votes sufficiently as a bloc to defeat the minority votes plus any cross-over votes. [13] The first and fifth Senate factors are, respectively, a history of official discrimination against the minority group and the extent to which the minority continues to bear the effects of discrimination in socioeconomic areas that hinder their ability to participate in the political process effectively. The district court concluded that neither Senate factors was present. [14] The district court apparently believed that it was required to consider only the existence and effects of discrimination committed *by the City of Watsonville itself*. This conclusion is incorrect. [15] Even if the first Senate factor does embrace only discrimination committed by Watsonville, that does not imply that the district court may not consider any relevant history or effects of discrimination committed by others, such as the state of California. [16] Further-

more, while any intent to discriminate by Watsonville would indeed be supportive of the appellants' claim, appellants need only show that, considering the totality of the circumstances,they do not have an equal opportunity to participate in the political process. [17] These arguments apply with equal force to the fifth Senate factor. [18] The appellants, however, did not present, and the record does not contain, sufficient evidence of historical discrimination against Hispanics to permit the court to find that Watsonville Hispanics have suffered from such discrimination. [19] But even without such a showing, appellants have clearly established a violation of Section 2. Factors other than the three elements discussed above, while supportive of a Section 2 violation, are *not essential to* a minority voter's claim. [20] Lastly, the court reversed the award of costs to appellees.

COUNSEL

Joaquin G. Avila, Fremont, California; Charles Stephen Ralston, NAACP Legal Defense and Educational Fund, Inc., New York, New York; James Robertson, Lawyers' Committee for Civil Rights Under Law, Washington D.C., for the plaintiffs-appellants.

Vincent R. Fontana, Wilson, Elser, Moskowitz, Edelman & Dicker, New York, New York, for the defendants-appellees.

ORDER

The members of the panel that decided this case have voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc. However, the

Opinion filed on July 27, 1988 is amended as indicated in the Amended Opinion accompanying this order.

With the Opinion so amended, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

NELSON, Circuit Judge:

Dolores Cruz Gomez, Patricia Leal, and Waldo Rodriguez ("Appellants") challenge the district court's ruling that the City of Watsonville's at-large mayoral and city council election system does not violate Section 2 of the Voting Rights Act as amended in 1982. 42 U.S.C. § 1973. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1343 (3) & (4). We have jurisdiction pursuant to 28 U.S.C, § 1291. We reverse and remand for implementation of a plan that comports with Section 2.

PROCEDURAL AND FACTUAL BACKGROUND

Appellants, Mexican-American citizens of Watsonville ("the City") eligible to vote, brought suit for declaratory and injunctive relief under 42 U.S.C. § 1973 ("Section 2"), 42 U.S.C. § 1983, and the fourteenth and fifteenth amendments. They have not appealed the district court's finding that no constitutional or § 1983 violations occurred. The appellants instead claim that the City's at-large system of mayoral and city council elections violates Section 2 by lessening the opportunity of Hispanics to participate in the political process and to elect representatives of their choice. Appellants seek implementation of a single-member districting plan to redress the alleged violation, and attorneys' fees and cost pursuant to 42 U.S.C. §§ 1973/(e) & 1988.

Appellants filed suit on May 21, 1985. On November 3, 1986, they filed a motion to enjoin the mayoral and city council election scheduled for May 1987. The district court denied this motion and held a trial from January 20-26, 1987. The district court found that racially polarized voting exists in Watsonville. The court did not find, however, that the Hispanic community was sufficiently politically cohesive or geographically insular to meet the Section 2 test. The district court issued a decision in favor of the City on January 30, 1987, and affirmed that decision after further briefing on February 20, 1987. The court awarded attorneys' fees and costs to the City. Appellants timely appealed.

The parties agree on many of the facts in this case. Appellants primarily challenge the district court's application of the legal standards governing Section 2 claims. The parties stipulated to the following facts, largely drawn from 1950-80 census data.

The City is governed by the city council, comprised of six council members and a mayor. Persons are elected to these position on an at-large basis, with three council members elected each odd-numbered year. The three candidates with the highest number of votes are elected. Before the citizens voted for an at-large system in November 1952, the City used a district or ward system.

According to the 1980 census, 48.9% of the City's population is Hispanic, 45.2% Anglo, 5.4% Asian and Pacific Islander, and 0.5% Black. In 1950, Hispanics comprised 1,001 persons in a total population of 11,373. As of 1980, 11,509 of Watsonville's 23,543 residents are Hispanic. Of those persons eighteen years and older, 40% are Hispanic and 60% non-Hispanic. However, Hispanics comprise only 37.0% of Watsonville's citizens because 41.5% of the Hispanics in Watsonville are non-citizens.

No Hispanic had ever been elected as mayor or city council member in Watsonville under the at-large system prior to the trial. Eight Hispanic candidates ran unsuccessfully for city council positions from 1971 to 1985 and one Hispanic ran for mayor in 1979.[2] Twenty-five of the 51 non-Hispanic candidates ran successfully for city council positions from 1971 to 1985. Hispanic persons have been appointed to City boards and commissions.

According to census data, many more non-Hispanics than Hispanics are employed in managerial and professional jobs in Watsonville. A fairly equal number of Hispanics and non Hispanics are employed as operators, fabricators and laborers. Many more Hispanics than non-Hispanics work in the farming, forestry and fishing industries in Watsonville. The number of Hispanics employed by the City itself has increased by 20% since 1973.

As of 1980, educational attainment levels differed among Hispanics and Anglos. Below are the number of persons 25 years and older completing school in the City.

		ANGLO	HISPANIC
Elementary		2,739	3,032
High School	(1-3 yrs.)	1,564	569
	(4 yrs.)	2,792	610
College	(1-3 yrs.)	1,728	311
	(4 or more yrs.)	1,084	171

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[2] After trial, one Hispanic was elected in May 1987 to the city council. This result was inevitable, however, because there were only two Anglo candidates, and three Hispanic candidates, for three positions. This does not affect the validity of appellants' claim. *See Thornburg v. Gingles*, 478 U.S. 30, 75-76 & n.37 (1986)(success of minority candidates at polls does not necessarily foreclose vote dilution claim.

Although the parties stipulated to the above facts, they dispute the *significance* of socioeconomic characteristics of the City's Hispanic community derived from the census data. Appellants maintain that the evidence reveals large discrepancies between the City's Hispanics and non-Hispanics in educational levels, income, and employment. Appellants stress that the Hispanic population has lower educational attainment levels; are employed in lower status professions, or more commonly are unemployed, and have lower family incomes; and rent instead of own their homes twice as often as other City residents. Appellants also emphasize that of the Watsonville Hispanics over age 5, 41% speak Spanish at home and approximately one-third do not speak English well or at all.

Appellees interpret the same statistics as showing less disparity between the two groups. They emphasize the increasing level of employment of Hispanics during the 1970s and the increasing level of employment of Hispanics by the City itself in recent years. However, appellees fail to compare those figures to the education and employment levels of the City's non-Hispanics. Appellees also emphasize disparities within the City's Hispanic population. For example, they note that lower and higher income Hispanics sometimes reside in the same census tracts, and that the Hispanics who do own homes own those of comparable value to those owned by non-Hispanics.

The district court here found that racially polarized voting exists in Watsonville. It relied on appellants' expert, Dr. Bernard Grofman, who analyzed the census data and concluded that voting is racially polarized in Watsonville. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 52-61 (1986) (relying on similar testimony from Dr. Grofman in upholding the trial court's finding of legally significant racially polarized voting). The district court found the evidence of racially polarized voting here "essentially uncontradicted" and found Dr. Grofman's methodology "completely without criticism."

However, the court ruled against appellants. It found Watsonville's Hispanic population insufficiently geographically compact to meet the requirements of a Section 2 claim. The district court recognized that the Hispanics have the potential to control two single-member districts, but rejected appellants' vote dilution claim because the majority of Hispanics would still reside in Anglo-controlled districts in which their vote was ineffective.

The district court also found that appellants failed to demonstrate sufficient political cohesiveness among the Watsonville Hispanics. Although the court found that 95% of Hispanic voters vote for the same candidates, the court considered low voter registration and turnout among Hispanics, and concluded that all Hispanics *eligible* to vote might not all vote alike. Further, the court found that socioeconomic differences and differences in political opinion supported a conclusion that Hispanics had shown low enthusiasm for past Hispanic candidates and this, in turn, undermined political cohesiveness.

The district court appears to have misunderstood the proper legal inquiry after the 1982 amendments. Because this circuit has not yet decided a case interpreting the 1982 amendments to Section 2 of the Voting Rights Act, we will begin with an analysis of the legal standards that are to be applied to challenges to at-large electoral schemes under the newly amended Section 2.

STANDARD OF REVIEW

In analyzing a Section 2 claim, we review the district court's factual findings under the clearly erroneous standard of Fed.R.Civ.P.52(a). *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). However, "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing

rule of law.'" *Id.* (quotation *Bose Corp v. Consumers Union of U.S.*, 446 U.S. 485, 501 (1984)). Accordingly, the district court's findings will be set aside to the extent that they rest upon an erroneous view of the law *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982). When findings have been set aside on this basis, the normal procedure is to remand the case so that the district court can redetermine the issue using the correct legal standard. *See id.* at 292. However, a remand is not necessary where the record on appeal "permits only one resolution of the factual issue." *Id.* at 287.

ANALYSIS

I. SECTION 2 VIOLATIONS

In 1982, Congress amended Section 2 of the Voting Rights Act of 1965. The amendments were designed to repudiate the "intent test" described in the plurality opinion in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which stated that an electoral scheme could not be challenged under Section 2 absent a showing that the scheme was intentionally designed or maintained for a discriminatory purpose. The 1982 Amendments replace the intent test with a "results test." Under the new test, a plaintiff in a Section 2 case must show that, based on the totality of the circumstances, the electoral process is "not equally open to participation by the members of a [racial or language minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973.[3]

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[3] The full text of the amended Section 2 reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political

(Footnote continued)

[1] The senate Judiciary Committee Report accompanying the act that amended Section 2 stated that the impact of a challenged electoral device should be judged "on the basis of objective factors." S. Rep. No. 417, 97th Cong., 2d Sess. 27, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 205. The report listed a number of objective factors that might be probative of a violation under the "totality of the circumstances test":

> subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973, as amended, 96 Stat. 134.

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction. *Id.* at 28-29, 1982 Code Cong. & Admin. News at 206-07.[4]

The report emphasized, however, that this list of factors was not a mandatory seven-pronged test; the list was only meant as a guide to illustrate some of the variables that should be considered by the court. As stated in the Report, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 29, 1982 U.S. Code Cong. & Admin. News at 207; *accord id.* at 29 n.118, 1982 U.S. Code Cong. & Admin. News at 207 n.118 ("[T]he Committee [does not] intend [that these factors] be used as a mechanical 'point counting' device. The failure of plaintiff to establish any particular factor is not rebuttal evidence of [no violation].").

[2] The Senate committee also noted that, while the basic "totality of the circumstances" test remains the same, the range of factors that would be relevant in any given case will vary depending upon the nature of the claim and the facts of the case. *See id.* at 28, 1982 U.S. Code Cong. & Admin. News at 206 ("To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question."); *see also id.* at 30, 1982 U.S. Code Cong. & Admin. News at 207 (noting that the proof sufficient to sustain a challenge based upon a series of events or episode "would not necessarily involve the same factors" that would be relevant in a challenge to a permanent structural barrier).

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[4] These factors are derived from *White v. Regester*, 412 U.S. 755 (1973), as developed by *Zimmer v. McKeithen*, 485 F.2d 1297 (1973), *aff'd*, 424 U.S. 636 (1976) (per curiam). *See Gingles*, U.S. at 36 n.4.

[3] The Supreme Court first interpreted the 1982 amendments to Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Thornburg* involved a challenge to the redistricting plan adopted by the North Carolina General Assembly. Several black citizens challenged the plan on the grounds that, *inter alia*, the plan's use of large, multimember voting districts had the effect of impermissibly diluting the voting strength of black voters, in violation of Section 2. The district court found that the use of multimember districts constitute impermissible vote dilution, and enjoined the state from conducting elections under the plan. The state appealed this judgment to the Supreme Court.

The Supreme Court began by noting that, "[w]hile many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts," only certain factors were "*essential*" to a successful claim of vote dilution. 478 U.S. at 48 & n.15. The Court cited many of the provisions of the Report quoted above, emphasizing that the Senate "list of typical factors is neither comprehensive nor exclusive." *Id.* at 45. The Court noted that, rather than applying the factors in a mechanical fashion, courts must judge Section 2 claims based on a "searching practical evaluation of the 'past and present reality' and on a 'functional' view of the political process." *Id.*

The Court stated that a plaintiff challenging a multimember district plan under Section 2 must show three things. First, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. The Court reasoned that, unless the minority group could constitute a majority in a single-member district, there is no sense in which "the *multimember form* of the district" is responsible for any inability of the minority group to participate equally. *Id.* (emphasis in original). That is, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the

challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 50 n.17. Second, "the minority group must be able to show that it is politically cohesive." The Court stated that, unless the minority group is politically cohesive, "it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Id.* at 51. Third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it --- in the absence of special circumstances, such as the minority candidate running unopposed --- usually to defeat the minority's preferred candidate." *Id.* at 50-51 (citations omitted). This showing of racial bloc voting establishes the required casual link between the use of a multimember district and the inability of the minority group "to elect its chosen representatives." *Id.* at 51. Furthermore, by showing that the majority is usually able to defeat the minority's candidates, the minority group is able to distinguish a "structural dilution from the mere loss of an occasional election." *Id.*

The Supreme Court noted that its analysis put substantially greater emphasis on some of the Senate factors than on others. The Court stated that the most important Senate factors in a case involving a challenge to a multimember electoral scheme are (1) "the extent to which minority group members have been elected to public office in the jurisdiction'" and (2) "the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" 478 U.S. at 48 n.15. These two factors overlap substantially with the last of the three elements which the Court stated must be proved. The Court went on to note that while the presence of the other Senate factors might be supportive of a challenge to a multimember voting scheme, they were "not essential to" such a claim. *Id.* (emphasis in original). The Court stated that, by recognizing that some of the Senate factors are more important to a multimember district vote dilution claim than others, it was simply "effectuat[ing] the intent of Congress. *Id.*

The Court then applied this test to the facts before it, and concluded that, under the applicable clearly erroneous standard, the district court's finding of a Section 2 violation must be affirmed, except with respect to one district in which there had already been sustained black electoral success. *Id.* at 77-80.

As the district court in this case recognized, Watsonville's at-large scheme is the functional equivalent of the electoral scheme at issue in *Gingles*. Having enunciated the legal standards spelled out in the Senate Report and in *Gingles*, we may now apply these standards to the facts of this case.

II. APPLICATION OF GINGLES

A. Geographic Concentration of Hispanics

[4] The first element of a Section 2 challenge to an at-large or other multimember voting scheme is a showing that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles,* 478 U.S. at 50. Accordingly, we use the single-member district as the measure in evaluating whether Watsonville's at-large procedure results in vote dilution. *See id.* at 50 n.17 ("The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected.").

Dr. Grofman demonstrated that 68.3% of the City's Hispanic population resides in three of nine census tracts. He analyzed the number of Hispanics eligible to vote, considering age and citizenship requirements, and concluded that they are compact geographically. Appellees have not refuted these statistical findings on appeal. The district court found, however, that Watsonville Hispanics are not sufficiently geographically insular because appellants' proposed plan includes only two

districts that would have contained a majority of Hispanic voters. The district court reasoned that because the plan would alleviate vote dilution for only one-third of the Hispanics eligible to vote, the appellants had not shown geographic insularity.

The district court erred in considering that approximately 60% of the Hispanics eligible to vote in Watsonville would reside in five districts outside the two single-member, heavily Hispanic districts in appellants' plan. Districting plans with some members of the minority group outside the minority-controlled districts are valid. *See, e.g. Ketchum v. City Council*, 630 F. Supp. 551, 557 (N.D. Ill. 1985); *Gingles v. Edmisten*, 590 F. Supp. 345, 357-59 (E.D.N.C. 1984), *aff'd in relevant part sub nom Thornburg v. Gingles*, 478 U.S. 30 (1986). As the Fifth Circuit stated in *Campos v. City of Baytown, Texas*, 840 F.2d 1240, 1244 (5th Cir. 1988): "The fact that there are members of the minority group outside the minority district is immaterial. All that is required is that the minority group be '*sufficiently* large and geographically compact to constitute a majority in a single member district.'" (quoting *Gingles*, 478 U.S. at 50 (emphasis added by Fifth Circuit)). The fact that the proposed remedy does not benefit all of the Hispanics in the City does not justify denying any remedy at all.

[5] The appellants' plan proposes two districts in which Hispanics would constitute a majority of the voters and would be able to elect representatives of their choice. It is sadly ironic that the district court concluded that because many Hispanic voters would still not be able to elect representatives of their choice under the proposed plan, no Section 2 claim could be maintained, thereby relegating all Hispanic voters to having no political effectiveness. The district court's finding is premised on a misunderstanding of the applicable legal standard. The Hispanics in Watsonville are capable of constituting a majority in at least one district, and therefore the court's finding that the group is not sufficiently geographically com-

pact is clearly erroneous. Appellants have demonstrated the first element of the *Gingles* test.

B. Political Cohesiveness of Hispanics

[6] The second requirement of the *Gingles* test is that appellants demonstrate that Watsonville Hispanics are politically cohesive. The district court found that 95% of the Hispanic voters in heavily Hispanic precincts support Hispanic candidates and that Hispanic voters ranked Hispanic candidates first or tied for first. Although the district court here found that "in actual[ity] those Hispanics who have voted have tended to vote for the same Hispanic candidates," the district court nonetheless concluded that the Hispanic community is not politically cohesive.

At the trial below, Dr. Grofman testified that Watsonville Hispanics voted the same way in substantial proportions in those elections analyzed. Dr. Grofman testified that this racial bloc voting is the primary factor in evaluating political cohesiveness, but he also pointed to other socioeconomic and cultural differences between Hispanics and non-Hispanics that contribute to the political cohesiveness of Hispanics in the City. He also cited evidence of single-shot voting (where minority members vote only for certain candidates and do not use their remaining votes) among Watsonville Hispanics to reinforce his conclusion.

Appellees argued below that Watsonville Hispanics are not politically cohesive and that appellants are not representative of Hispanics in Watsonville. The appellee's expert, Dr. Peter Morrison, and two lay Hispanic witnesses testified to the existence of political differences within the Watsonville Hispanic community. Dr. Morrison concluded that he would "not expect . . . to find all Hispanics in Watsonville voting alike." He based this projection on socioeconomic differences among Hispanics and the failure of many eligible Hispanics to register

and/or vote. Appellee's lay witnesses, whom the district court found credible, enumerated reasons why they believed that members of the Hispanic community did not always support Hispanic candidates enthusiastically.

In reviewing all of this evidence, the district court concluded that, *with respect to those Hispanics who have actually voted*, the evidence favored a finding of political cohesiveness. Nonetheless, the court concluded that, because "no significant number of eligible Hispanics have voted in the elections under consideration," the Hispanic community as a whole was too apathetic to be politically cohesive.

The district court's finding on this issue is based on a misunderstanding of what is meant by "political cohesiveness." The inquiry is essentially whether the minority group has expressed clear political preferences that are distinct from those of the majority. Thus, a "showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim." *Gingles*, 478 U.S. at 56. Indeed, the Court recognized that one of the reasons for focusing on the Senate factor concerning "racially polarized voting" is that proof that the minority has consistently voted differently helps one "to ascertain whether minority group members constitute a politically cohesive unit." *Id.* The Supreme Court's definition of "political cohesiveness" is further elucidated by referring to the articles that the Court cites as its primary source for the concept. In one passage cited by the Court, *see id.* at 51, 56, Blacksher and Menefee state that "[w]hether a racial group is politically cohesive depends on its *demonstrated propensity* to vote as a bloc for candidates of issues popularly recognized as being affiliated with the group's particularized interests." Blacksher & Manefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 59 (1982) (emphasis added).

[7] Accordingly, under the "functional" approach mandated by Section 2, *see Gingles*, 478 U.S. at 48 (quoting S. Rep. at 30 n.120, 1982 Code Cog. & Admin. News at 208), the issue of political cohesiveness is to be judged primarily on the basis of the voting preferences expressed in actual elections. This conclusion finds additional support in the decisions of other circuits. In *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 935 (4th Cir. 1987), the Fourth Circuit stated that "the existence of racially polarized voting . . . establishes both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates." The court then emphasized that "[t]he legal standard for the existence of racially polarized voting looks *only to the difference between how majority votes and minority votes were cast.*" *Id.* (emphasis added). Similarly, in *Campos*, the Fifth Circuit noted that the Determination as to whether a minority is politically cohesive "is not an inquiry to be made prior to and apart from a study of polarized voting, . . . because the central focus is on voting patterns." 840 F.2d at 1244. After quoting from *Gingles*, the Fifth Circuit concluded that "[i]t follows that a minority group is politically cohesive if it votes together." *Id.*

[8] Applying these standards to the district court's decision, it is clear that the court applied the wrong legal standard. The district court erred by focusing on low minority voter registration and turnout as evidence that the minority community was not politically cohesive. The court should have looked only to *actual voting patterns* rather than speculating as to the reasons why many Hispanics were apathetic. In fact, there is nothing in the record to support the district court's apparent conclusion that lack of enthusiasm for Hispanic candidates was responsible for the low rates of voter registration

among Hispanics. *See United States v. Dallas County Comm'n*, 739 F.2d 1529, 1536 (11th Cir. 1984).[5]

[9] The district court expressly found that predominantly Hispanic sections of Watsonville have, in actual elections, demonstrated near unanimous support for Hispanic candidates. This established the requisite political cohesion of the minority group.

The district court's reliance on socioeconomic disparities and differences of political opinion within the Hispanic community as support for Dr. Morrison's projection was also erroneous. Such differences within the community are only relevant to the extent that they reflect differences in voting behavior among Hispanics. Here, however, the district court found that Hispanics vote alike, coalescing behind Hispanic candidates. Given this degree of cohesion in their voting behavior, the fact that Watsonville Hispanics differ amongst themselves along many other dimensions is irrelevant.

This conclusion is supported by two recent decisions of the Fifth Circuit. In *Campos*, 840 F.2d at 1245-47, and *League of United Latin American Citizens v. Midland Independent School Dist.*, 812 F.2d 1494, 1500 (5th Cir.) *vacated and aff'd on other grounds*, 829 F.2d 546 (1987), the Fifth

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[5] Indeed if defendants could defeat a showing of political cohesion by showing little more than that many minority voters were apathetic, Section 2 would be seriously weakened. Low voter registration and turnout have often been considered evidence of minority voters' lack of *ability* to participate effectively in the political process. *See, e.g., Gingles*, at 478 U.S. at 38-39. Courts have repeatedly noted that depressed registration rates may often be traceable in part to historical discrimination. *Id.* at 39; *Dallas County*, 739 F.2d at 1538; *Backanaga v. Sisseton Independent School Dist.*, 804 F.2d at 469, 475 (8th Cir. 1986) (low voter registration evidences the lingering socioeconomic effects of past discrimination).

Circuit concluded that groups of Blacks and Hispanics in certain cities were politically cohesive for purposes of Section 2 violations. Thus, despite the many ethnic and cultural differences between Blacks and Hispanics, the two groups were found to have "political goals that are inseparable." *Midland*, 812 F.2d at 1500. The defendants in *Midland* offered a survey indicating that Blacks and Hispanics have mutually exclusive interests and are politically distinct groups. The Fifth Circuit, however, emphasized that "the survey does not prove that the two minority groups would *vote differently* in any particular election in which a member of one of their groups is a candidate against [a white person]." *Id.* at 1501 (emphasis added). These decisions teach that a finding that Hispanics overwhelmingly vote for different candidates than do non Hispanics, as was found by the district court here, is ample support for political cohesiveness.

[10] In the fact of the actual voting patterns found by the district court, its finding of noncohesiveness, based on Dr. Morrison's projection that not all Hispanics are *likely* to vote alike and on anecdotal lay testimony about the differences within the Hispanic community, was clearly erroneous. Appellants have established the second element of the *Gingles* test.

C. Racial Bloc Voting Among Majority

[11] Finally, to maintain a Section 2 claim appellants must demonstrate racial bloc voting among the majority. "[A] white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56; *accord Campos*, 840 F.2d at 1248-49.

As noted above, 60% of Watsonville residents over age 18 are non-Hispanic and 41.5% of the Hispanics in Watsonville are non-citizens. The district court found that only an

average of 13% of the voters in predominantly Anglo precincts vote for Hispanic candidates while 95% of the Hispanic voters in heavily Hispanic precincts support Hispanic candidates. The court also found that Anglo voters ranked Hispanic candidates last or near last while Hispanic voters ranked Hispanic candidates first or tied for first.

Time is also probative in establishing pattern of racial bloc voting. The Court in *Gingles* found persuasive a series of elections in which the minority group had sponsored candidates without electoral success. 478 U.S. at 57. The parties here have stipulated that a similar pattern exists in Watsonville. No Hispanic had ever been elected as mayor or city council member under the at-large system prior to the trial. Eight Hispanic candidates ran unsuccessfully for city council positions from 1971 to 1985 and one Hispanic ran for mayor in 1979. Twenty-five of 51 non-Hispanic candidates ran successfully for city council positions from 1971 to 1985. Such a pattern over time of minority electoral failure strongly indicates racial bloc voting. *Gingles*, 478 U.S. at 57.

[12] The district court accepted these statistics and held that racial bloc voting occurs in the City. The court found strong evidence that Hispanics and Anglos supported different candidates. Although the court did not separately find that Anglo bloc voting occurs, it is clear that the non-Hispanic majority in Watsonville usually votes sufficiently as a bloc to defeat the minority votes plus any crossover votes.

D. Other factors

The district court found that the *third* Senate factor was not present, emphasizing that Watsonville does not employ electoral devices with the potential to dilute minority voting strength such as an anti-single shot voting requirement or a majority vote requirement. However, the third Senate factor also includes "unusually large election districts" as a disfavored

voting procedure. It is not disputed that an at-large system is employed in Watsonville.[6] The parties also stipulated to the lack of a district residency requirement for mayoral or city council candidates. The absence of a district residency requirement can hinder the political access of minority groups because all the candidates can come from outside minority neighborhoods. *See Rogers v. Lodge*, 458 U.S. 613, 627 (1978); *White v. Regester*, 412 U.S. 755, 766 n.10 (1973): Therefore the third Senate factor was present, at least in part.

The district court correctly found that no evidence of the fourth and sixth Senate factors, exclusion from the candidate slating process or the use of racial appeals in campaigns, had been shown.

[13] The first and fifth Senate factors are, respectively, a history of official discrimination against the minority group and the extent to which the minority continues to bear the effects of discrimination in socioeconomic areas that hinder their ability to participate in the political process effectively. Appellants did not present evidence of historical discrimination against Hispanics other than the socioeconomic differences between Hispanics and non-Hispanics stipulated to by the parties. The appellants did not introduce such evidence because they believed that they had amply demonstrated a Section 2 violation. The district court disagreed and concluded that the first and fifth Senate factors were not present. Indeed, the district court found "no evidence whatever of official discriminatory practices of any sort directed at the Hispanic residents of Watsonville, either presently or historically." It emphasized

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6 Of course, at-large districts are not per se violative of Section 2. Plaintiffs must demonstrate vote dilution based upon a totality of the circumstances. *Gingles*, 478 U.S. at 46; *accord* S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, 16, 33, *reprinted in* 1982 Code Cong. & Admin. News 177, 193, 211.

that the City government had not been unresponsive to the needs of Hispanics and that the City had ben "singularly free of overt discrimination against Hispanics" during the thirty-year period covered by the evidence. Further, the court found "no evidence that any differences in educational attainment, job opportunity, income or health benefits are the result of past discrimination of any kind, or that past discrimination has caused those factors to impede the ability of the Hispanic community to participate in the [political] process."

[14] Although we do not believe that the district court committed clear error in finding that the City of Watsonville has not itself engaged in discrimination against Hispanics, we nonetheless remain troubled by the court's handling of the first and fifth Senate factors. The district court apparently believed that it was required to consider only the existence and effects of discrimination committed *by the City of Watsonville itself.* This conclusion is incorrect.

[15] The first Senate factor requires consideration of "[t]he extent of any history of official discrimination *in the state or political subdivision* that touched the right of members of the minority group . . . to participate in the political process." S. No. 417 Rep. at 28, 1982 U.S. Code Cong. & Admin. News at 206 (emphasis added). Arguably, this limitation requires that one consider only electoral discrimination committed by the relevant political subdivision. Such a reading however, would result in precisely the sort of mechanistic application of the Senate factors that the Senate Report emphatically rejects. The court is required to consider the totality of the circumstances, and given that the enumerated Senate factors are "neither comprehensive nor exclusive," *Gingles,* 478 U.S. at 45, there is nothing to suggest that courts are *forbidden* to consider discrimination committed by parties other than the relevant political subdivision. Thus, even if the first Senate factor does embrace only discrimination committed by Watsonville, that does not imply that the district court may not

consider any relevant history or effect of discrimination committed by others, such as the state of California.

[16] Furthermore, such a restrictive reading places too much emphasis on the plaintiff's ability to prove intentional discrimination. Section 2 was amended by Congress precisely to relieve plaintiffs of the burden of showing such intent. While any intent to discriminate by Watsonville would indeed be supportive of the plaintiffs' claim, plaintiffs need only show that, considering the totality of the circumstances, they do not have an equal opportunity to participate in the political process. There is no apparent reason why other forms of discrimination against Watsonville Hispanics may not be considered as factors that contribute to making the Watsonville at-large election scheme a device that impedes Hispanics' equal participation in the electoral process.

Lastly, the court decisions from which the Senate factors were derived, *see* note 3, *supra*, both considered the existence of *statewide* discrimination as a factor in concluding that at-large elections in particular counties violated Section 2. *See White v. Regester*, 412 U.S. 755, 766-67 (1973)(referring to statewide and countywide discrimination against blacks in Dallas County, Texas); *id.* at 767-68 (noting statewide discrimination against Mexican-Americans); *Zimmer v McKeithen*, 485 F.2d 1297, 1306 (5th Cir. 1973)(referring to the effect of statewide racial segregation in education).

[17] These arguments apply with equal force to the fifth Senate factor, which states that courts may consider "the extent to which members of the minority group *in the state or political subdivision* bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process." (emphasis added). Moreover, the literal language of the fifth Senate factor does not even support the reading that only discrimination by Watsonville may be considered; the limiting

language describes the people discriminated against, not the discriminator.

[18] The district court does not appear to have considered whether Watsonville Hispanics have suffered from discrimination by parties other than the City of Watsonville or whether any such discrimination has affected the ability of Hispanics to participate effectively in the city's electoral process. Thus, while the district court's interpretation of the first and fifth Senate factors rested on an erroneous view of the law, the appellants did not present, and the record does not contain, sufficient evidence of historical discrimination against Hispanics to permit this court to find that Watsonville Hispanics have suffered from such discrimination.

[19] Were it necessary to decide this issue, we would consider the propriety of taking judicial notice of the pervasive discrimination against Hispanics in California, including discrimination, committed by the state government, that has touched the ability of California Hispanics to participate in the electoral process.[7] *See, e.g., Castro v. State*, 2 Cal. 3d 223, 231, 466 P.2d 244, 85 Cal. Rptr. 20, 25 (1970)(declaring a California constitutional provision making the ability to read English a prerequisite for voting unconstitutional as applied to those literate in another language). However, we conclude that, even without such a showing, plaintiffs have clearly established a violation of Section 2. As noted earlier, factors other than the three elements discussed above, while supportive of a Section 2 violation are "*not essential to* a minority voter's claim." *Gingles*, 478 U.S. at 48 n.15. Here, the plaintiffs have shown that Watsonville Hispanics overwhelmingly and consistently have voting preferences that are

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[7] Were we to do so, we would of course be required to provide Watsonville with an opportunity to be heard with regard to our use of judicial notice fo this fact. *See* Fed. R. Evid. 201(e).

distinct from those of white voters, that white voters have consistently voted as a racial bloc against such candidates, and that a single-member district system would result in some districts having a Hispanic majority. Considering all of these circumstances, we cannot but conclude that, regardless of the good faith of city officials, Watsonville's at-large system is an impermissible obstacle to the ability of Hispanics to participate effectively in the political process.

We remand for implementation of a plan that comports with Section 2. The district court has broad equitable powers to fashion relief which will remedy the Section 2 violation completely. *See* S. Rep. No., 417 at 31, 1982 Code Cong. & Admin. News at 208.

III. ATTORNEYS' FEES

Appellants request attorneys' fees and costs for this appeal pursuant to 42 U.S.C. §§ 1973-(e) & 1988. The district court awarded costs of suit to the City. "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988; *see also id.* § 1973-(e). Attorneys' fees can be awarded at the trial or appellate level to prevailing parties under 42 U.S.C. § 1988. *See Sotomura v. County of Hawaii*, 679 F.2d 152 (9th Cir. 1982). Attorneys' fees should be awarded in vote dilution claims unless special circumstances make such an award unjust. *Campaign for a Progressive Bronx v. Black*, 631 F. Supp. 975, 980 (S.D.N.Y. 1986).

[20] Appellants are clearly the prevailing party in this litigation and no special circumstances prevent an award in this case. We thus reverse the district court's award of costs to appellees. On remand, the district court should award appellants cost and reasonable attorneys' fees, including the fees incurred in pursuing this appeal. The court should determine the

appropriate amount after implementation of a plan that does not violate Section 2.

CONCLUSION

We reverse the district court's judgment in favor of the City because of its legal misunderstandings and erroneous finding of insufficient geographical insularity and political cohesiveness. We find that, based on the totality of the circumstances, the at-large scheme of mayoral and city council elections in Watsonville impermissibly dilutes the voting strength of Hispanics. We remand for implementation of a plan that comports with the requirements of Section 2.

REVERSED AND REMANDED.

APPENDIX C. ORDER OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, FILED JANUARY 19, 1989.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOLORES CRUZ GOMEZ, PATRICIA LEAL, and WALDO RODRIGUEZ,

Plaintiffs,

v.

THE CITY OF WATSONVILLE, et al.,

Defendant.

No. 87-1751

USDC No. CV-85-20319-WAI

ORDER

Before: GOODWIN and NELSON, Circuit Judges; and GILLIAM* , District Judge.

* Honorable Earl B. Gilliam, United States District Judge for the Southern District of California, sitting by designation.

The members of the panel voted unanimously to deny the petition for rehearing, and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

The motion for stay of mandate pending petition for writ of certiorari is DENIED. The parties have seven days from the date of this order before the mandate will issue, during which time they may file a petition for writ of certiorari.

APPENDIX D. DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (INGRAM, J. JANUARY 30, 1987); ORDER (INGRAM, J. FEBRUARY 20, 1987); JUDGMENT AWARDING COSTS (INGRAM, J. FEBRUARY 4, 1987).

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOLORES CRUZ GOMEZ, PATRICIA LEAL, and WALDO RODRIGUEZ,

Plaintiffs,

v.

CITY OF WATSONVILLE,

Defendant.

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NO.DIST. OF CA.

NO. C-85-20319-WAI

Plaintiffs are entitled to take nothing by their complaint. Defendant is entitled to judgment in its favor, together with its costs of suit actually incurred.

Plaintiffs seek a declaration that the at-large election procedure presently employed by the City of Watsonville for the election of members of the City Council is in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, of 42 U.S.C. §1983, and of the Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiffs further seek a permanent injunction, enjoining the City from continuing the use of the present at-large election procedure for City Council elections, and further request the court to adopt a districting plan which is in compliance with the Voting Rights Act and with the Fourteenth and Fifteenth Amendments. Plaintiffs seek an election, as soon as practicable, to be conducted pursuant to such districting plan. Plaintiffs have submitted in evidence a proposed districting plan, exhibit 8A. Plaintiffs further seek their costs and reasonable attorney's fees pursuant to 42 U.S.C. §§1973i(e) and 1988.

Defendant City denies that the at-large election system presently used violates the Voting Rights Act.

The group from which plaintiffs come, and which is characterized by plaintiffs as a minority group which has been denied access to the political process by reason of the conduct of at-large elections are Americans of Hispanic descent and language; the dominant group is said to be comprised of Americans of white non-Hispanic ancestry, or what the parties in the course of the trial, and on some of the exhibits, have sometimes been referred to as Anglos.

In order to prevail, plaintiffs must sustain their burden of proof on three elements. These are set forth in *Thornburg v. Gingles*, 478 U.S. ___, 106 S.Ct. 2752, 92 L.Ed.2d 2546-47 (1986):

1. The Hispanic community in Watsonville is sufficiently large and geographically compact to constitute a majority in an electoral district or districts each formed for the election of one council member.

2. The Hispanic community in Watsonville is politically cohesive.

3. The majority Anglo group votes sufficiently as a bloc to enable it to usually defeat the preferred candidate of the Hispanic community.

In their joint Pretrial Statement, filed herein on December 30, 1986, the parties have stipulated that the following material facts are not in dispute:

1. According to the 1980 census, the total population of the City of Watsonville and its racial and ethnic composition areas follows:

> Total population is 23,543; the Spanish Origin population is 11,509 or 48.9% of the city's population; the Asian and Pacific Islander population is 1,263 or 5.4% of the city's population; the Black population is 127 or .5% of the city's population.

2. According to the 1980 census, the City of Watsonville's Spanish Origin population in each census tract is as follows:

1101 (Part) - 1,216	1104 (Part) - 2,317
1102 (Part) - 1,241	1105 (Part) - 2,377
1103 (Part) - 3,163	1106 (Part) - 1,174
	1107 (Part) - 21

3. According to the 1980 census, the total city population eighteen years old and older is 16,729 of which 9,970 (60%) are non-Spanish Origin and 6,759 (40%) are Spanish Origin.

4. According to the 1980 census, 58.7% of the total Spanish Origin population in the City of Watsonville is eighteen years old or over and 82.8% of the total non-Spanish Origin population is eighteen years old or over.

5. According to the 1950, 1960, 1970 and 1980 censuses, the population of the City of Watsonville grew as follows:

YEAR	TOTAL POPULATION	SPANISH ORIGIN POPULATION
1950	11,373	1,001
1960	13,293	2,265
1970	14,569	5,069
1980	23,543	11,509

6. According to the 1950, 1960, 1970, and 1980 censuses, the Spanish Origin population in the City of Watsonville grew at the rate of 126.3% during the 1950-1960 decade, at the rate of 123.8% during the 1960-1970 decade, and at the rate of 127.0% during the 1970-1980 decade.

7. According to the 1950, 1960, 1970, and 1980 consensus, the City of Watsonville total population grew at the rate of 16% during the 1950-1960 decade, at the rate of 9.6% during the 1960-1970 decade, and at the rate of 61.6% during the 1970-1980 decade.

8. According to the 1950 and 1980 censuses, the City of Watsonville total population grew at the rate of 107.0% during the period 1950 to 1980.

9. According to the 1950 and 1980 censuses, the Spanish Origin population in the City of Watsonville grew at the rate of 1,049.8% during the period of 1950 to 1980.

10. According to the 1980 census, 76.9% of the total population of the City of Watsonville were citizens.

11. According to the 1980 census, the Spanish Origin citizen population comprises 37.0% of the total City of Watsonville citizen population.

12. According to the 1980 census, 58.5% of the Spanish Origin population of the City of Watsonville were citizens and 41.5% are non-citizens.

13. A seven single-member district plan for electing members to the City of Watsonville City Council has been formulated based upon the 1980 census.

(a) Such a seven single-member district plan has been drawn to create seven districts with a population distribution as follows:

Dist.	Total	Black	Asian & Pacific Islander	Spanish Origin	Sp.O.	% Pop.
1	3,352	22	100	2,644	78.9	- .3
2	3,324	25	232	2,672	80.4	-1.2
3	3,477	19	272	1,285	37.0	+3.4
4	3,333	18	112	1,468	44.0	- .9
5	3,392	14	105	1,500	44.2	+ .9
6	3,359	11	172	1,056	31.4	- .1
7	3,306	18	270	884	26.7	-1.7
Total:	23,543	127	1,263	11,509		
Minority Percentages:		5%	5.4%	48.9%		

14. The City of Watsonville is governed by a Council Manager form of government.

15. The City Council is the governing body for the City of Watsonville.

16. The City Council for the City of Watsonville is comprised of six council members and one mayor.

17. The Mayor and the City Council members for the City of Watsonville are elected at-large.

18. City Council elections for the City of Watsonville are on a staggered basis, with three council persons elected each odd-numbered year.

19. City Council elections for the City of Watsonville are based upon a plurality of the votes cast in a given election.

20. There is no majority vote requirement for the election of the mayor or councilpersons.

21. There is no anti-single shot voting requirement for the election of the mayor or councilpersons in the City of Watsonville.

22. There is no district residency requirement for City Council candidates.

23. Prior to 1953, City Council elections for the City of Watsonville were based upon a ward system. There were four wards, each electing two aldermen. One alderman was elected from each ward at the same time. The City Council consisted of eight aldermen and one mayor.

24. As a result of a special election held on November 4, 1952, City Council elections for the City of Watsonville were converted from a ward system to an at-large election system. At the time of the change in method of electing City Council members approximately 1,001 Hispanics in the City out of a total population of 11,373.

25. As a result of the special election held on February 6, 1960, the Council-Manager form of government was instituted in the City of Watsonville. The size of the City Council was reduced from one mayor and eight aldermen to one mayor and six council members.

26. During the period of 1971 to 1985, there were 25 City Council elected positions available for the City of Watsonville. During this time period there were a total of 59 candidates for these positions. Out of the 59 candidacies, eight were Spanish surname candidates. There were no Spanish surname candidates for City Council in 1975 and 1977.

27. The eight Spanish surname candidates for election to the City of Watsonville City Council and their respective number of votes are as follows:

1971	Jess T. Gomez (Two-year term)	520
1973	Leo R. Estrada Teresa E. Montoya	193 219
1979	Angelina Ledesma Anthony Campos	725 408
1981	Mario Carabarin	717
1983	Cruz Gomez	850
1985	Maria Bautista	504

28. During the period of 1971 to 1985, none of the eight Spanish surname candidates to the City Council for the City of Watsonville were elected.

(a) There is not now and never has been a Mexican American on the Watsonville City Council.

29. During the period 1971 to 1985, there were four elected mayoral positions available. During this time there were ten mayoral candidates as follows:

1983 - 4
1979 - 3
1975 - 1
1971 - 2

Only one mayoral candidate was Spanish surname (Carlos Cervantes in 1979).

30. Prior to running for mayor in 1979, Carlos Cervantes had not run for any political office in the City of Watsonville.

31. During the period from 1971 to 1985, after losing their elections, the Spanish surname candidates for City Council did not seek election to the City Council for the City of Watsonville.

32. During the period from 1971 to 1985, out of the 51 non Spanish surname candidates for election to the City Council for the City of Watsonville, there were 25 non-Spanish surname winners.

33. According to the 1980 census for the City of Watsonville persons 25 years and older completed school as follows:

		ANGLO	SPANISH
Elementary		2,739	3,032
High School	(1-3 yrs.)	1,564	569
	(4yrs.)	2,792	610
College	(1-3 yrs.)	1,728	311
	(4 or more yrs.)	1,084	171

(Spanish origin can be of any race)

34. The City Council for the City of Watsonville appoints to the Design Review Commission, the Library Board, the Parks and Recreation Commission, the Planning Commission, the Personnel Commission, the Wastewater Board of Control, and three members to serve as Parks and Recreation Advocates. Two members of the Parks and Recreation Advocates are appointed by the Parks and Recreation Commission. The City Council acting as the

Redevelopment Agency of the City of Watsonville appoints members to the Redevelopment Advisory Committee.

35. For the City of Watsonville in 1986, out of the seven members of the Planning Commission two or 29% have Spanish surnames.

36. For the City of Watsonville in 1986, out of the five members of the Design Review Commission one or 20% has a Spanish surname.

37. None of the five members of the Library Board have Spanish surnames.

38. For the City of Watsonville, out of five present members appointed to the Park and Recreation Commission, one has a Spanish surname.

39. For the City of Watsonville, two of the five (40%) individuals presently serving on the Personnel Commission have Spanish surnames.

40. For the City of Watsonville, out of the 17 members appointed to the Redevelopment Advisory Committee, two have Spanish surnames.

41. None of the nine members presently appointed to the Waste Water Board of Control have Spanish surnames.

42. For the City of Watsonville, out of the five members presently appointed to be Parks and Recreation Advocates one,or 20%, has a Spanish surname.

43. According to the 1980 census for the City of Watsonville, the number of non-Spanish Origin persons 16 years and over employed in managerial, and professional specialty occupation was 1191, while the number of employed

Spanish Origin persons 16 years and over in the same occupation categories was 399.

44. According to the 1980 census for the City of Watsonville, the number of Spanish Origin persons 16 years and over employed in the categories of operators, fabricators and laborers was 1440, while the number of employed non-Spanish Origin persons 16 years and over in the same occupation categories was 1443.

45. According to the 1980 census for the City of Watsonville, the number of Spanish Origin persons 16 years and over employed in the categories of farming, forestry and fishing was 1048, while the number of employed non-Spanish Origin persons 16 year and over in the same occupation categories was 597.

46. The total work force of the City of Watsonville increased from 165 in 1973 to 232 in 1984 (or 40%). During this time the total number of Hispanics employed by the City of Watsonville increased from 21 in 1973 to 46 in 1984, a 20% increase. The yearly increase is as follows:

YEAR	TOTAL EMPLOYEES	TOTAL HISPANICS	PERCENT HISPANICS
1973	165	21	12.7%
1974	161	22	13.6%
1975	179	25	14.0%
1976	174	13	7.4%
1978	180	28	15.5%
1979	188	32	17.0%
1980	204	35	17.0%
1981	213	41	19.2%
1982	222	42	18.9%
1983	225	45	20.0%
1984	232	46	19.8%

Preliminarily, it is observed that unlike the factual situation in *Thornburg*, and that in *McNeil v. City of Springfield*, C.D. Ill., No. 85-2365 (Jan. 12, 1987), there is here no evidence whatever of official discriminatory practices of any sort directed at the Hispanic residents of Watsonville, either presently or historically. There is no proven legacy of discrimination. *Thornburg* charges the courts with the duty of evaluating whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice [n.9 omitted]," on the basis of the objective factors suggested in the Senate Report which accompanied the 1982 amendments to 42 U.S.C. {1973, which substantially accord with the factors set out by the Fifth Circuit in *Zimmer v. McKeithen*, F.2d 1297, *aff'd.* 424 U.S. 636 (1976), and in *White v. Regester*, 412 U.S. 755 (1973). *Thornburg*, 92 L. Ed. 2d at 42-43, *quoting* the Senate Report. The totality of circumstances is to be examined in order to take a functional view of the political process in question. I examine those now.

As stated there is no evidence of a history of vote related discrimination similar to that found by the district courts in *Thornburg* and *McNeil.*

There is evidence now before this court as to the extent that voting in Watsonville City Council elections is racially polarized. That evidence bears upon a necessary element of the proof of plaintiffs' claim and will be later discussed.

There is no evidence that the at-large council elections have enhanced the opportunity for discrimination against the Hispanic group by the use of majority vote requirements, prohibitions against one shot voting, exclusion from candidate slating processes and the like.

There is no evidence that any differences in educational attainment, job opportunity, income or health benefits are the result of past discrimination of any kind, or that past discrimination has caused those factors to impede the ability of the Hispanic community to participate in the process.

There is no evidence of racial appeal, whether subtle or overt, in political campaigns.

There is evidence that within the time periods embraced by the evidence, roughly the 1970's and 1980's, no Hispanic candidate has achieved election to the City Council, and in fact none has done well in the elections.

There is no evidence that the City of Watsonville has been unresponsive to the needs of the Hispanic community, and indeed the evidence reveals the contrary, as demonstrated by the testimony of Ernest Lopez and of Anne Soldo.

Thus, it appears that Watsonville has been singularly free of overt discrimination against Hispanics or any other group for the period covered by the evidence which is generally the thirty-year period between 1950 and 1980. The Hispanic community increased from less than 10% of the total population of Watsonville in 1950 to 48.9% of the total population in 1980. In 1980, the Hispanic population outnumbered the Anglo population by 3.7 percentage points. The parties have agreed that this is so. Most of the marked increase in Hispanic population occurred between 1970 and 1980, when it grew by 127%. As indicated by the facts agreed to by the parties, the increases between 1950 and 1960, and between 1960 and 1970, were also substantial, being 6.3% and 123.8% respectively.

Bernard Grofman, Ph.D, a well qualified political scientist, testified as to statistical analysis performed by him bearing upon issues in this case. His methodology and

testimony were relied upon by the trial court in *Thornburg*, and that reliance was found to be not clearly erroneous by the Supreme Court.

The analysis employed in the instant case included ecological regression where possible, mixed case analysis and bar graphs. Dr. Grofman testified that these modalities of analysis are parallel with and consistent with the analysis performed by him in the *Thornburg* case.

This statistical evidence is essentially uncontradicted by any other statistical evidence. The methodology employed by Dr. Grofman in this record is completely without criticism.

I find that this evidence strongly suggests to the point of preponderance a proclivity on the part of Hispanic voters and Anglo voters to support candidates who are members of their respective groups. This tendency is vividly illustrated by page 9 of plaintiff's exhibit 9. Dr. Grofman examined the six elections occurring between 1973 and 1985, in which Spanish surnamed candidates participated resulting in a finding that a similar pattern in all examined elections existed. Dr. Grofman testified that there is less than one chance in one thousand that the pattern could have occurred by chance alone. The testimony of Ms. Paz and Mr. Castro, both of whom the court regards as highly credible witnesses, suggests that this type of polarization is not in fact the case and that unqualified Hispanic candidates will command support in neither the Hispanic nor the Anglo community. On the issue of polarization, as indicated in *Thornburg*, the court is principally concerned with the behavior of the Anglo community and whether as a factual reality that behavior dictates the virtual impossibility of the election of an Hispanic candidate under the present at-large election procedures. On the basis of the evidence before me, I conclude that a preponderance of the evidence favors plaintiffs on this issue.

Dr. Grofman has also analyzed factors bearing upon the politically cohesiveness of the Hispanic community in Watsonville. He states that Hispanic voting patterns demonstrate voting at "landslide" levels. Table 2-B of exhibit 9 contains estimates made by him which tend to support a conclusion that the Hispanic voting community possesses a degree of cohesion which results in essentially unanimous support for those Hispanic candidates who ran in the six elections considered by Grofman between 1973 and 1985. In reaching his express conclusion that the Hispanic group is politically cohesive, Dr. Grofman examined exhibits 10-46 and especially referred to exhibit 12, indicating a comparison between the Spanish Origin population in a given block group and the percentage of renter units in such a block group; exhibit 25, a bar graph indicating the degree of participation of Spanish surnamed people in five occupational categories ranging from managerial and professional occupations to farm workers and laborers; exhibit 30, which is a table analyzing income by households ranging from $5,000 to $50,000 and indicating the respective percentages of non-Hispanic and Hispanic households in each income category; exhibit 33, which is similar to exhibit 25, except the latter deals with 1970 occupational data while exhibit 3 deals with 1980 occupational data. Because of the characteristics of the Hispanic community revealed in those exhibits, Dr. Grofman concluded that each of the factors considered in those exhibits will give rise to a different point of view as between Hispanic and non-Hispanic persons, which will tend to reflect a cohesive community of interest within those two groups, both generally and as to the particular issues which are the subject of the exhibits. It seemed to the court that Dr. Grofman in a sense conceded that the methodology employed by him might be faulty, but he indicated that his conclusions with respect to political cohesiveness are valid if supported by lay testimony. The elicited lay testimony primarily from the witnesses Lopez, Gomez, Paz and Castro does not tend to unanimously support Dr. Grofman's conclusion. And to that extent, it cannot be

unequivocally stated that a preponderance favors the positions of plaintiff on the issue of cohesiveness based upon the Grofman analysis and the lay testimony alone.

However, Justice Brennan has said in *Thornburg* that a showing of a significant number of minority group members whose practice it is to usually vote for the same candidates is one way of proving the degree of political cohesiveness necessary to fulfill the second element in a vote dilution claim. In view of the finding just made on the issue of polarization, the evidentiary equation may be enhanced in favor of plaintiffs.

Bearing also on the question of political cohesiveness is the testimony of Peter A. Morrison, Ph.D, a well-qualified specialist in demographics and in urban population dynamics. He essentially testified that on many of the issues considered by Dr. Grofman in stating his opinion with respect to cohesiveness, the community is so heterogeneous as to render any conclusion with respect to shared point of view as expressed by Grofman unlikely. As an example, exhibit T-6 deals with five neighborhoods where 45% of all Hispanic homeowners live. Dr. Morrison characterizes this as a natural political constituency of home owners. He testified that such a constituency is not confined to only one area, but is disbursed into many parts of the city. In contrast, exhibit T-7 indicates that 50% of renters reside in proposed districts 1 and 2 and effectively forms a separate political constituency. Similar diversities of residential area are shown in exhibits T-9 and T-10 dealing with the locations of persons at various poverty levels. Dr. Morrison testified that he found it significant that there exists in Watsonville no urban ghetto occupied by the poor, but that there is extreme spatial variation and wide diversity of residential areas. In sum, it was the opinion of Dr. Morrison that none of the antecedents of political cohesiveness are present in the Watsonville situation and that one would not expect to find that all Hispanics voted alike, due to the widely differing circumstances and stakes involved

among the community. He stated that his opinion on the lack of political cohesion is based on clear evidence of variability within the community.

Many of the factors testified to by Dr. Morrison are logically persuasive. The actual voting data before the court as contained in the agreed statement of facts not in dispute, and primarily in exhibit 9, indicates that in actual those Hispanics who have voted have tended to vote for the same Hispanic candidates. The court agrees with Dr. Morrison that undoubtedly a substantial factor in the failure to elect Hispanic candidates may very likely be due to an apparent disinclination of Hispanics of voting age and citizenship to register and/or turn out to vote. Certainly the voting totals indicating Hispanic vote are minimal in light of the registration figures and in light of the percentages of persons eligible to vote. Exhibit 9, Table 5, exhibit 16, 16A, 16B. It is, however, suggested in the evidence, through the testimony of Cruz Gomez, that this apparent disinclination to register or to vote is a concomitant of the vote dilution syndrome which plaintiffs by this action seek to alleviate. The court finds that a preponderance of the evidence does not favor that interpretation.

The true issue, as stated by Justice Brennan, is whether a significant number of minority group members have demonstrated a tendency of practice to vote for the same candidate. The evidence amply supports the affirmative of this issue with respect to those who have actually voted. Dr. Grofman has stated these numbers to be statistically significant. However, the issue deals with political cohesiveness in the community as a whole. I find that no significant number of eligible Hispanics have voted in the elections under consideration, and therefore that political cohesiveness based upon racial polarization alone has not been demonstrated by a preponderance of the evidence.

Finally, the factor of geographic compactness is considered. Plaintiffs have submitted a proposed plan of single member districting (exhibit 8A), which demonstrates the possibility of structuring two districts in the City of Watsonville in which Hispanic persons heavily preponderate and within which Hispanic voters have a fair opportunity to achieve the election of candidates of their choice. Exhibit T-1 demonstrates that within proposed districts 1 and 2 a total of 46.2% of all Hispanic residents of Watsonville would reside. 53.8% of Hispanic persons would reside in the other five districts designated by the proposed plan. If persons who are citizens and of voting age are considered, 36.4% would reside within proposed districts 1 and 2, and 63.6% would reside outside those districts. It is thus apparent that the adoption of a districting plan, at least in the configuration suggested by plaintiff, would alleviate voting dilution if it exists for only slightly more than one-third of Hispanics eligible to vote, and would provide no assistance to nearly two-thirds of the Hispanic population except as they may be said to benefit from the election of any Spanish candidate from whatever district as suggested by Dr. Grofman. Exhibit T-6 illustrates the high percentage of Hispanic homeowners who live in areas well removed from the proposed districts 1 and 2. Exhibit T-7 demonstrates that 27% of Hispanic homeowners in 1980 lived essentially outside the area of the proposed districts 1 and 2, while 19% resided within those districts. The "T" series of exhibits demonstrates the wide dispersion of the Hispanic population throughout the City of Watsonville as does the oral testimony of Dr. Morrison.

The court has a real question as to whether the Hispanic population of Watsonville in whose behalf this relief is sought is geographically insular. The question is, in other words, whether the present at-large system of election in Watsonville, which is essentially the equivalent of a multi-member election district as treated in *Thornburg*, is demographically essentially integrated in which case the

present at-large or multi-member system would not be responsible for the Hispanic voters inability to elect candidates of their choice.

The evidence unquestionably shows that 36.4% of Hispanic persons eligible to vote are geographically insular, and that 63.6% are not. No one has cited authority upon which I can rely to make a determination that geographic insularity of 36.4% of the subject group is enough to fulfill the burden of proof. If there is such authority, plaintiffs will please cite it in post judgment motions.

There is language in *Gingles v. Edmiston*, 590 F. Supp. 345 at 358 (E.D.N.C., 1984), which may suggest that the creation of some district where minority residents are sufficient in number and contiguity to constitute an effective voting majority is what should be contemplated.

Presently, I cannot find that the evidence preponderates in favor of the plaintiff on the issue of geographic insularity or compactness. I invite further argument on this issue in appropriate post judgment motions.

CONSTITUTIONAL ISSUES

The court finds that the evidence does not preponderate in favor of a finding of violations of the Fourteenth and Fifteenth Amendments, United States Constitution, in that there is not evidence of discriminatory intent in the adoption, implementation and maintenance of the at-large municipal election system by the City of Watsonville.

42 U.S.C. §1973

The provisions of 42 U.S.C. §1973 are not violated by the at-large election system as utilized in the City of Watsonville.

42 U.S.C. §1983

There is no showing by a preponderance of the evidence of a violation of 42 U.S.C. §1983.

This court has jurisdiction of this cause pursuant to 42 U.S.C. §1973, 28 U.S.C. §§1331, 1343(3) and (4), 1344, 2201 and 2202.

The foregoing Decision shall serve as Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 54A.

DATED: January 30, 1987

/s/
WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOLORES CRUZ GOMEZ, PATRICIA LEAL, and WALDO RODRIGUEZ,

Plaintiffs,

v.

CITY OF WATSONVILLE,

Defendant.

Further argument on the issue of geographic compactness was heard on February 13, 1987. The court has considered the oral argument of the parties and all briefs and memoranda filed by the parties in support of their respective contentions.

Neither *Ketchum v. City Council of the City of Chicago*, 630 F. Supp. 551 (N.D. Ill. 1985), nor *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984), *aff. sub. nom., Mississippi Republican Executive Committee v. Brooks*, ____ U.S. ____, 105 S. Ct. 416 (1984), convinces the court that any change in its Memorandum of Decision filed January 30, 1987, is necessary or justified. Neither of those cases directly address the question of geographic compactness as it is presented in the instant case and as discussed in *Thornburg v. Gingles*, ____ U.S. ____, 106 S. Ct. 2752 (1986).

Accordingly, the court adheres to and reaffirms its decision of January 30, 1987.

Dated: February 20, 1987

/s/
WILLIAM A. INGRAM
United States District Judge

D-24

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOLORES CRUZ GOMEZ, PATRICIA LEAL, and WALDO RODRIGUEZ,	)
Plaintiffs,	)
v.	)
CITY OF WATSONVILLE,	)
Defendant.	)

No. C-85-20319-WAI

JUDGMENT

The above-entitled cause came duly on for trial, was fully and fairly tried, argued, and submitted, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by their Complaint, and that defendant go hence with its costs.

Dated: February 4, 1987

/s/

WILLIAM A. INGRAM
United States District Judge
ENTERED IN CIVIL DOCKET 2-10-1987

(2)

No. 88-1236

Supreme Court, U.S.
FILED
FEB 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE CITY OF WATSONVILLE,

Petitioner,

v.

DOLORES CRUZ GOMEZ, PATRICIA LEAL and WALDO RODRIGUEZ,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Plaintiffs-Respondents Dolores Cruz Gomez, Patricia Leal, and Waldo Rodriguez, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's judgment in this case.

STATEMENT OF THE CASE

Plaintiffs-Respondents, Hispanic voters, filed this challenge to the at-large election system as utilized by the City of Watsonville, California, to select members to the City Council, under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. According to the 1980 Census, Hispanics comprised 48.9% of the City's population of 23,543 persons. Appendix at D-3.[1] The Hispanic population

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[1] Appendix citations refer to the Appendix attached to the Defendants-Petitioners' Petition for a Writ of Certiorari to the United States Court of

comprised 37.0% of the City's total citizen population. Appendix at D-5.

The City Council is composed of one mayor and six city council members. Elections to the City Council are on a staggered basis, with three council persons elected at-large in each odd-numbered year. The mayor is elected on an at-large basis, as well. Appendix at D-6.

From 1971 to 1985, eight Hispanic candidates sought election as council members and one Hispanic sought election to the office of mayor. All of these candidates were unsuccessful. Appendix at D-8. For the same time period, in sharp contrast, there were 25 non-Spanish surname winners out of 51 non-Spanish surname candidates. Appendix at D-9.

Appeals for the Ninth Circuit.

After a trial on the merits, the District Court held that the at-large election system as implemented by the City of Watsonville did not violate Section 2. The District Court rejected Respondents' challenge despite several critical factual findings regarding elections in Watsonville. It specifically found that municipal elections in the City of Watsonville were racially polarized.[2] The

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[2] The District Court stated:

> "I find that this evidence strongly suggests to the point of preponderance a proclivity on the part of Hispanic voters and Anglo voters to support candidates who are members of their respective groups. . . . On the issue of polarization, as indicated in Thornburg [v. Gingles, 478 U.S. 30, 106 S.Ct. 2752 (1986)], the court is principally concerned with the behavior of the Anglo community and whether as a factual reality that behavior dictates the virtual impossibility of the election of an Hispanic candidate under the present at-

District Court also found that as to those Hispanics who voted, a significant number of Hispanics have tended to vote for the same Hispanic candidates. Appendix at D-16.[3] Finally, the District Court found that at least two districts could be created which would provide the Hispanic voters "with a fair opportunity to achieve

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> large election procedures. On the basis of the evidence before me, I conclude that a preponderance of the evidence favors plaintiffs on this issue."

Appendix at D-14.

[3] As the District Court found:

> "The true issue, as stated by Justice Brennan, is whether a significant number of minority group members have demonstrated a tendency of practice to vote for the same candidate. The evidence amply supports the affirmative of this issue with respect to those who have actually voted."

Appendix at D-17.

the election of candidates of their choice." Appendix at D-18.

The District Court's decision in favor of the City of Watsonville was based on findings that Watsonville's Hispanic minority lacked political cohesiveness and that the Hispanic community was not sufficiently geographically compact. The District Court concluded that minority political cohesiveness could not be determined on the basis of racially polarized voting patterns alone since the number of Hispanic eligible voters who had voted in prior elections was not significant. Appendix at D-17. The District Court concluded that the Hispanic community was not sufficiently compact because over half of the Hispanic community resided outside the two proposed minority single member districts. Appendix at D-18, D-19.

The Court of Appeals for the Ninth Circuit, applying the standards of Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2762 (1986), reversed the District Court's decision. Since the minority plaintiffs presented a plan consisting of two districts, each with a majority of Hispanic eligible voters, the Court of Appeals held the Thornburg requirement of geographical compactness had been satisfied. With respect to the issue of minority political cohesiveness, the Ninth Circuit Court held that actual voting patterns should be utilized as the standard of proof. Since the District Court found that a significant number of Hispanic voters voted for the same Hispanic candidates, the Ninth Circuit Court concluded that the Thornburg standard of minority political

cohesiveness had been met. Appendix at B-28, B-29.

Having found all of the Thornburg requirements met, the Ninth Circuit concluded that Respondents had established a Section 2 violation and remanded the case to the District Court with instructions to implement a single-member districting plan which comported to Section 2. Appendix B-29.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Presents No Questions as to the Legal Standards for Determining Geographical Compactness or Political Cohesiveness Which Are Sufficiently Important for Supreme Court Review.

The Petition should be denied because it does not present any undecided questions as to either geographical compactness or political cohesiveness of sufficient importance for the Court to

review as required by Rule 17.1(c) of the Supreme Court Rules. In applying Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the United States Court of Appeals for the Ninth Circuit routinely applied the standards of proof for challenges to at-large election systems established by this Court in Thornburg. The Court of Appeals neither enunciated new standards of law nor applied established standards to new factual patterns.

In strict accordance with the findings required by the Thornburg standards, the Ninth Circuit Court held that: (1) the minority community was sufficiently geographically compact to constitute a majority of the eligible voter population in at least two single member districts, (2) the minority community was politically cohesive, and (3) there was an Anglo voting bloc which

voted to defeat the candidates preferred by the minority community. Appendix at B-29. The Ninth Circuit's ruling was based principally upon the following facts: (1) prior to trial, no Hispanic had ever been elected to the office of mayor or city council member despite nine Hispanic candidacies from 1971 to 1985; (2) municipal elections were racially polarized. The evidence on this latter issue, as noted by the District Court, was essentially uncontradicted and completely without criticism. Appendix at B-8, B-9.

The Ninth Circuit's ruling represents a routine application of the Thornburg standards. Thus, the Petition raises no questions of sufficient importance to warrant the granting of certiorari.

This Court's decision in Thornburg identifies minority geographical compactness and minority political

cohesiveness as two of the three critical elements of an at-large challenge under Section 2 of the Voting Rights Act (the other is Anglo bloc voting). See, Thornburg, 106 S.Ct. at 2766-67.

With respect to the geographical compactness requirement, this Court's language is clear. It imposes no requirement, such as that argued for by the Petitioner, that a majority of the City of Watsonville's Hispanic population must reside within the predominantly minority districts. The Petitioner has not cited, and cannot cite, to any language in the Thornburg opinions as support for the gloss it would place over the Court's clear language.

The Ninth Circuit Court correctly applied the Thornburg standard in finding the geographical compactness test met by "a showing that the minority group 'is

sufficiently large and geographically compact to constitute a majority in a single member district.' Gingles, 478 U.S. at 50" (emphasis supplied).

See, Appendix at B-17. The Court of Appeals reviewed the record and found that there were at least two districts which consisted of a majority of Hispanic eligible voters. Appendix at B-18. It correctly deemed the presence of minority group members outside those two minority districts inconsequential.[4]

With respect to the issue of minority political cohesiveness, the Court's

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[4] Accord, Campos v. City of Baytown, Texas, 840 F.2d 1240, 1244 (5th Cir. 1988) ("The fact that there are members of the minority group outside the minority district is immaterial. All that is required is that the minority group be 'sufficiently large and geographically compact to constitute a majority in a single member district.' ").

holding in Thornburg is equally unambiguous:

> A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim . . . and, consequently, establishes minority bloc voting within the context of § 2.

106 S.Ct. at 2769-70.

Consistent with this standard, this Court further stated that one can determine minority political cohesiveness by reviewing actual voting patterns. As stated by the Court, "The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." 106 S.Ct. at 2769.

The Ninth Circuit reviewed the record with respect to actual voting patterns and found that there was "near unanimous support for Hispanic candidates" from the Hispanic community; this pattern "established the requisite political cohesion of the minority group." Appendix at B-22.

In this holding, the Court of Appeals did not create a new standard of proof. Rather, the Ninth Circuit correctly applied the Thornburg standard.[5]

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[5] A similar standard of proof which focuses on actual voting patterns has been applied by other Circuits. Collins v. City of Norfolk, Va., 816 F.2d 932, 935 (4th Cir. 1987) ("[T]he existence of racially polarized voting . . . establishes both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates.") ("The court should inquire separately into minority and majority voting, to see whether members of the minority usually vote for the same candidates -- if so, there is the requisite minority political cohesiveness.").

2. The Court of Appeals' Decision Is Entirely Consistent With Section 2 Decisions of This Court and Other Lower Courts.

Petitioner's assertion that the decision below conflicts with other Section 2 decisions of this Court and other lower federal courts is pure rhetoric without substance.

Petitioner misstates this Court's holding in Thornburg with respect to the Zimmer[6] factors. In Thornburg, this Court applied the totality of circumstances test, first articulated in Zimmer, and later codified in Section 2 as amended, to determine the ultimate question of whether, as the Court below correctly

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The Fifth Circuit followed the same standard in Campos, supra, 840 F.2d at 1244: "[A] minority group is politically cohesive if it votes together."

[6] Zimmer v. McKeithen, 424 U.S. 636 (1976).

framed the issue, "[T]he electoral process is 'not equally open to participation by the members of a [racial or language minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Appendix at B-11.

However, both Thornburg and the legislative history of Section 2 as amended explicitly reject Petitioner's notion that certain of the Zimmer factors -- indeed, the less important and non-dispositive ones -- are indispensable to finding that an at-large election system violates Section 2. See, Thornburg, 106 S.Ct. at 2764, 2766 n. 15:

> 'There is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'

* * *

> The most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.' . . . If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists -- for example antibullet voting laws and majority vote requirements -- are supportive of, but not essential to, a minority voter's claim.

(citations to legislative history omitted) (emphasis in original).

Petitioner laments that the Court of Appeals did not require proof of a history of official discrimination by the City of Watsonville, and disputes the Court's conclusion with respect to the evidence of

socio-economic disparities. Petitioner's position boils down to its disagreement with what this Court decided in Thornburg, as Justice O'Connor explicitly recognized in her concurring opinion:

> As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the "Zimmer factors". . . . There is simply no need for plaintiffs to establish "the history of voting-related discrimination in the State or political subdivision," . . . or "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," . . . or "the exclusion of members of the minority group from candidate slating processes," . . . or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health," . . . or "the use of overt or subtle racial appeals in political campaigns," . . . or that "elected officials are unresponsive to the particularized needs of the members of the minority group."

106 S.Ct. at 2788-89; see also, 106 S.Ct. at 2787 ("If these three requirements are met . . . [t]he minority group has proved dilution in violation of § 2").

The Ninth Circuit Court correctly applied the "totality of the circumstances" test as defined by Thornburg. In evaluating the at-large election system utilized by the City of Watsonville, the Ninth Circuit Court focused on the two factors specified by Thornburg. The Ninth Circuit Court found that racial bloc voting existed in Watsonville (Senate Factor 2) and that no minorities had ever been elected to the City Council prior to trial (Senate Factor 7). Appendix at B-24. The Ninth Circuit also reviewed the other Senate Factors. However, consistent with Thornburg, the Court below did not view the remaining

Senate Factors as essential. Appendix at B-28.[7]

Petitioner's contention that there is a conflict between the Ninth Circuit's Watsonville decision and the holdings of other lower courts is likewise in error.

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[7] Accord, Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1561 (11th Cir. 1987) ("Applying the totality of circumstances approach, the district court made specific findings of fact as to other Senate factors bearing on vote dilution. Although these factors are supportive of, but not essential to a minority voter claim, contrary to the district court's findings, proof of these factors is not required to show a vote dilution claim"); id., 1562 ("However, we point out, that Thornburg commands the trial court's attention to the Senate factors which are deemed most important to a vote election claim . . . [:] the extent of minority electoral success and polarized voting); Collins, supra, 816 F.2d at 935 ("The implication of this gloss on (2, is that, of the seven primary factors on the Senate Report list, two are typically the most important: the existence of racially polarized voting, which establishes both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates, and the actual results of minority-preferred candidates in winning elections").

There is no conflict between the decision below and the opinion of the Court of Appeals in Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), with respect to the issue of minority political cohesiveness. In remanding Carrollton for reconsideration in light of Thornburg, the Eleventh Circuit Court specifically noted the absence of any finding of the existence of minority political cohesiveness, and further noted, "The proof of racial polarization may, of course, be found sufficient by this Court to make the necessary finding of cohesiveness." 829 F.2d at 1563 and n. 15. Thus, the Eleventh Circuit decision presents no conflict with the decision below on the issue of minority political cohesiveness.

Likewise, there is no conflict between the decision of the Court of

Appeals in this case and the district court decisions in Thornburg and in McNeil v. City of Springfield, 658 F.Supp.1015 (C.D. Ill. 1987) with respect to the geographical compactness issue. The fact that those two cases were brought as class actions comprise, on this issue, a distinction without a difference. Nothing in the geographical compactness criterion as articulated in this Court's Thornburg decision restricts it to being found in class actions, and nothing in Thornburg or any other decision suggests that the standard for finding geographical compactness applies any differently depending on whether formal class action treatment is obtained.

Just as a Section 2 at-large challenge is an assertion of individual rights that may be brought by or on behalf of less than a large majority (or any

particular number) of minority voters, see pp. 10-11, supra and Appendix at B-18 - B-19, so, too, a Section 2 case is not a popularity contest in which plaintiffs must demonstrate the allegiance of, or promise tangible benefits to, 60% or more of the minority community. If Petitioner has any legitimate concern, it is for the remedy stage of this case, which has not been reached due to Petitioner's years of intransigence and delay in the stubborn defense of its discriminatory election system.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

February 24, 1989.

Respectfully submitted,

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